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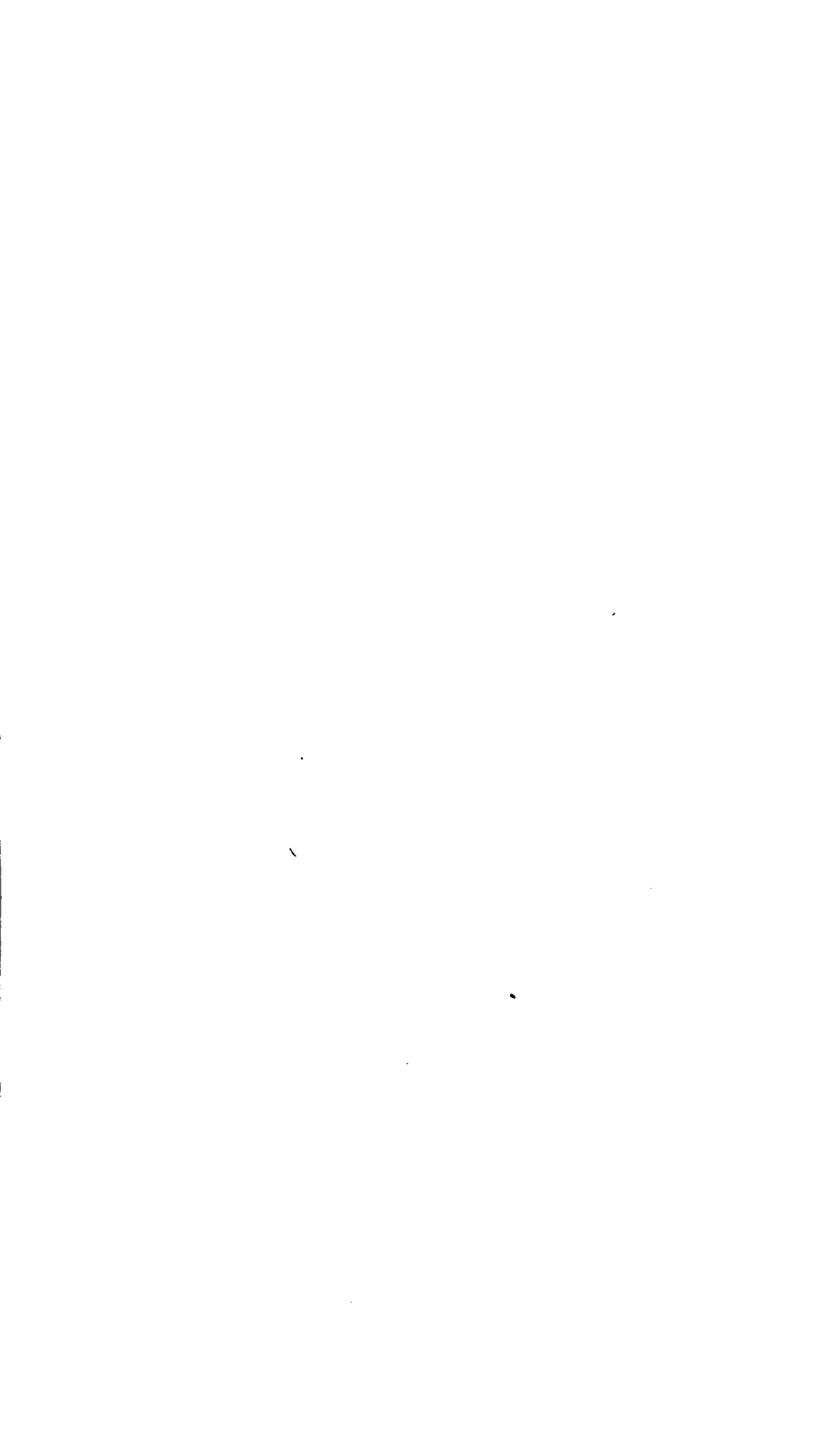
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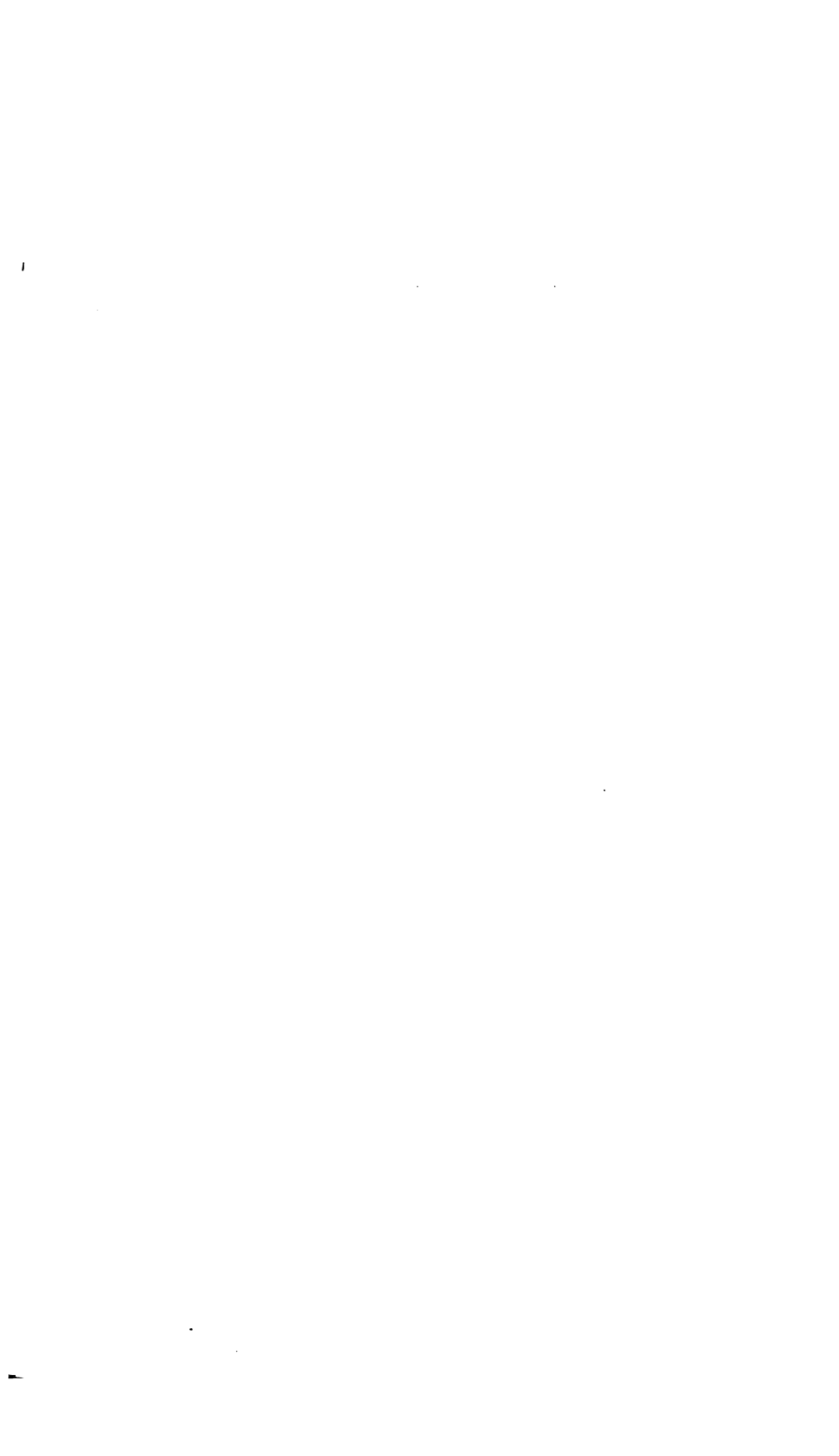
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AN  
ESSAY  
ON THE  
LAW OF BAILMENTS.

BY  
SIR WILLIAM JONES KNT.

---

Third London edition,

WITH

*NOTES AND REFERENCES*

ON THE SUBJECT OF

CARRIERS, INNKEEPERS, WAREHOUSEMEN, AND OTHER BAILERS.

By WILLIAM NICHOLS, ESQ.

Of Lincoln's Inn, Barrister at Law.

WITH ADDITIONAL NOTES AND REFERENCES TO

AMERICAN DECISIONS,

BY

WILLIAM HALSTED, JUN. ESQ.

---

NEW-YORK:

PUBLISHED BY O. HALSTED,

AND

JOHN GRIGG, PHILADELPHIA.

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## P R E F A C E .

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IN publishing a new edition of the present Essay, the object in view has been to render a work of great and acknowledged merit of some degree of practical utility ; and, by combining the decisions of our courts with the masterly and elegant exposition of the general principles upon which they are established, to make it acceptable to a more numerous class of persons. For this purpose, the various cases upon the different species of bailments have been collected and arranged in the notes ; and as these upon the subject of carriers are numerous, the note upon that part of the work has unavoidably extended to some length, but not so much so, it is hoped, as to prove inconvenient to those who may be desirous of perusing the text. The authorities in the Civil Law, from whence the important principles disclosed in the following Essay have been derived, are also referred to, and the laws of foreign countries have, in some few instances, been remarked.

It is proper to add, that of the former edition, published by Mr. Balmanno, a few references to authorities inserted in the commencement of that edition, have been retained, and also one or two notes which are to be found in the concluding part of that work.

3, Inner Temple Lane, }  
18th March, 1823. }



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AN  
**ESSAY**  
ON THE  
**LAW OF BAILMENTS.**

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HAVING lately had occasion to examine with some attention the nature and properties of that contract which lawyers call BAILMENT, or a *delivery of goods on a condition, expressed or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose for which they were bailed shall be answered,* I could not but observe, with surprise, that a title in our ENGLISH law, which seems the most generally interesting, should be the least generally understood, and the least precisely ascertained. Hundreds and thousands of men pass through life, without knowing, or caring to know, any of the numberless niceties which attend our abstruse, though elegant, system of real property, and without being at all acquainted with that exquisite logic on which our rules of special pleading are founded: but there is hardly a man of any age or station, who does not every week, and almost every day, contract the obligations or acquire the rights of a *hirer* or a *letter to hire*, of a *borrower* or a *lender*, of a *depository* or a *person depositing*, of a *commissioner* or an *employer*, of a *receiver* or a *giver*, in *pledge*; and what can be more absurd, as well as more dangerous, than frequently to be bound by duties without knowing the nature or extent of them, and to enjoy rights of

[ 2 ]

which we have no just idea? Nor must it ever be forgotten, that the contracts above mentioned are among the principal springs and wheels of civil society; that, if a want of mutual confidence, or any other cause, were to weaken them, or obstruct their motion, the whole machine would instantly be disordered or broken to pieces; preserve them, and various accidents may still deprive men of happiness; but destroy them, and the whole species must infallibly be miserable. It seems, therefore, astonishing, that so important a branch of jurisprudence should have been so long and so strangely unsettled in a great commercial country; and that, from the reign of ELIZABETH to the reign of ANNE, the doctrine of *bailments* should have produced more contradictions and confusion, more diversity of opinion and inconsistency of argument, than any other part, perhaps, of juridical learning; at least, than any other part equally simple.

[ 3 ]

Such being the case, I could not help imagining that a short and perspicuous discussion of this title, an exposition of all our ancient and modern decisions concerning it, an attempt to reconcile judgments apparently discordant, and to illustrate our laws by a comparison of them with those of other nations, together with an investigation of their true spirit and reason, would not be wholly unacceptable to the student of English law; especially as our excellent BLACKSTONE, who of all men was best able to throw the clearest light on this, as on every other subject, has comprised the whole doctrine in three paragraphs, which, without affecting the merit of his incomparable work, we may safely pronounce the least satisfactory part of it; for he represents *lending* and *letting to hire*, which are *bailments* by his own definition, as contracts of a *distinct species*; he says nothing of employment by *commission*; he introduces the doctrine of a *distress*, which has

an analogy to a *pawn*, but is not properly *bailed*; and on the great question of *responsibility for neglect*, he speaks so loosely and indeterminately, that no fixed ideas can be collected from his words.(a) His Commentaries are the most correct and beautiful outline that ever was exhibited of any human science; but they alone will no more form a lawyer, than a general map of the world, how accurately and elegantly soever it may be delineated, will make a geographer; if, indeed, all the titles, which he professed only to sketch in elementary discourses, were filled up with exactness and perspicuity, *Englishmen* might hope, at length, to possess a digest of their laws, which would leave but little room for controversy, except in cases depending on their particular circumstances; a work which every lover of humanity and peace must anxiously wish to see accomplished. The following Essay (for it aspires to no higher name) will explain my idea of supplying the omissions, whether designed or involuntary, in the Commentaries on the Laws of ENGLAND.

[ 4 ]

I propose to begin with treating the subject *analytically*, and, having traced every part of it up to the first principles of natural reason, shall proceed, *historically*, to show with what perfect harmony those principles are recognized and established by other nations, especially the ROMANS, as well as by our ENGLISH courts, when their decisions are properly understood and clearly distinguished; after which I shall resume *synthetically* the whole learning of *bailments*, and expound such rules as, in my humble apprehension, will prevent any further perplexity on this in-

Subject proposed.

(a) 2 Comm. 452, 453, 454.(1)

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(1) See Christian's Edit. Black. Com. vol. ii. p. 453. note 11, where the learned commentator's inaccuracy on the subject is also admitted, and where a just encomium is given to the elegance, the liberal learning, and the sound law of this Essay.

teresting title, except in cases very peculiarly circumstanced.

[ 5 ] From the obligation, contained in the definition of bailment, *to restore the thing bailed at a certain time*, it follows, that the bailee must *keep* it, and be *responsible* to the bailor, *if it be lost or damaged*; but, as the bounds of justice would, in most cases, be transgressed, if he were made answerable for the loss of it *without his fault*, he can only be obliged to keep it with a degree of *care proportioned to the nature of the bailment*; and the investigation of this degree in every particular contract is the problem which involves the principal difficulty.

I. Analysis.

There are infinite shades of *care* or *diligence*, from the slightest momentary thought, or transient glance of attention, to the most vigilant anxiety and solicitude; but *extremes* in this case, as in most others, are *inapplicable to practice*: the first extreme would seldom enable the bailee to perform the condition, and the second ought not in justice to be demanded; since it would be harsh and absurd to exact the same anxious care, which the greatest miser takes of his treasure, from every man who borrows a book or a seal. The degrees then of care, for which we are seeking, must lie somewhere between these extremes; and, by observing the different manners and characters of men, we may find a certain standard, which will greatly facilitate our inquiry; for, although some are excessively careless, and others excessively vigilant, and some through life, others only at particular times, yet we may perceive, that the *generality of rational men* use nearly the same degree of diligence in the conduct of *their own affairs*; and this care, therefore, which *every person of common prudence and capable of governing a family* takes of *his own concerns* is a proper measure of that which would uniformly be required in performing every contract, if there were not

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strong reasons for *exacting* in some of them a *greater*, and *permitting* in others a *less*, degree of attention. Here then we may fix a constant determinate point, on each side of which there is a series consisting of variable terms tending indefinitely towards the above-mentioned extremes, in proportion as the case admits of indulgence or demands rigour: if the construction be *favourable*, a *degree of care less* than the standard will be sufficient; if *rigorous*, a *degree more* will be required; and, in the first case, the measure will be that care which *every man of common sense, though absent and inattentive*, applies to his own affairs; in the second, the measure will be that attention which a man *remarkably exact and thoughtful*, gives to the securing of his personal property.

The fixed mode or standard of diligence I shall, for want of an apter epithet, invariably call ORDINARY; although that word is equivocal, and sometimes involves a notion of degradation, which I mean wholly to exclude; but the unvaried use of the word in one sense will prevent the least obscurity. The degrees on each side of the standard being indeterminate, need not be distinguished by any precise denomination; the first may be called LESS, and the second MORE, THAN ORDINARY diligence. [ 7 ]

*Superlatives* are exactly true in mathematics; they approach to truth in abstract morality; but in practice and actual life they are commonly false; they are often, indeed, used for mere *intensives*, as the *MOST diligent* for *VERY diligent*; (2) but this a rhetorical figure; and as Rhetoric, like her sister, Poetry, delights in fiction, her language ought never to be adopted in sober investigations of truth; for this reason I would reject from the

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(2) See Vinnius in Inst. 3. 15. 5. n. 2.

present inquiry, all such expressions as *the utmost care*, *all possible* or *all imaginable diligence*, and the like, which have been the cause of many errors in the code of ancient ROME, whence, as it will soon be demonstrated, they have been introduced into our books even of high authority.

[ 8 ] Just in the same manner, there are infinite shades of *default* or *neglect*, from the slightest inattention or momentary absence of mind, to the most reprehensible supineness and stupidity: these are the omissions of the before-mentioned degrees of diligence, and are exactly correspondent with them. Thus the omission of that care, *which every prudent man takes of his own property*, is the determinate point of negligence, on each side of which is a series of variable modes of default infinitely diminishing, in proportion as their opposite modes of care infinitely increase; for the want of extremely great care is an extremely little fault, (3) and the want of the slightest attention is so considerable a fault, that it almost changes its nature, and nearly becomes in theory, as it exactly does in practice, a breach of trust and a deviation from common honesty. (4) This known or fixed point of negligence is therefore a mean between *fraud* and *accident*; and, as the increasing series continually approaches to the first extreme, without ever becoming precisely equal to it, until the last term melts into it or vanishes, so the decreasing series continually approximates to the second extreme, and at length becomes nearer to it than any assignable difference: but the last terms being, as before, excluded, we must look within them for modes applicable to practice; and these we shall find to be the omissions of such care as *a man*

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(3) See Bargalius de dolo, lib. 5. cap. 5. sect. 19.

(4) See D. 17. 1. 29.

*of common sense, however inattentive, and of such as a very cautious and vigilant man, respectively, take of their own possessions.*

The constant, or fixed, mode of *default* I likewise call ORDINARY ; not meaning by that epithet to diminish the culpability of it, but wanting a more apposite word, and intending to use this word uniformly in the same sense : of the two variable modes the first may be called GREATER, and the second LESS, THAN ORDINARY ; or the first GROSS, and the other SLIGHT, neglect.

[ 9 ]

It is obvious that a bailee of common honesty, if he also have common prudence, would not be *more negligent than ordinary* in keeping the thing bailed : such negligence (as we before have intimated) would be a violation of good faith, and a proof of an intention to defraud and injure the bailor.

It is not less obvious, though less pertinent to the subject, that infinite degrees of *fraud* may be conceived increasing in a series from the term where *gross neglect* ends, to a term where positive *crime* begins ; as *crimes* likewise proceed gradually from the lightest to the most atrocious ; and, in the same manner, there are infinite degrees of *accident*, from the limit of extremely slight neglect to a *force irresistible* by any human power. Law, as a practical science, cannot take notice of melting lines, nice discriminations, and evanescent quantities ; but it does not follow, that *neglect, deceit* and *accident* are to be considered as indivisible points, and that *no degrees whatever* on either side of the standard are admissible in legal disquisitions.

Having discovered the several modes of *diligence* which may justly be demanded of contracting parties, let us inquire in what particular cases a bailee is by natural law bound to use them, or to be answerable for the omission of them.

When the contract is *reciprocally beneficial* to both parties, the obligation hangs in an even balance; and there can be no reason to recede from the standard; nothing more, therefore, ought in that case to be required than *ordinary diligence*, and the bailee should be responsible for no more than *ordinary neglect*: (5) but it is very different, both in reason and policy, when *one* only of the contracting parties derives advantage from the contract.

If the *bailor only* receive benefit or convenience from the bailment, it would be hard and unjust to require any particular trouble from the *bailee*, who ought not to be molested unnecessarily for his obliging conduct: if more, therefore, than *good faith* were exacted from such a person, that is, if he were to be made answerable for less than *gross neglect*, few men, after one or two examples, would accept goods on such terms, and social comfort would be proportionally impaired. (6)

On the other hand, when the *bailee alone* is benefited or accommodated by his contract, it is not only reasonable, that he *who receives the benefit should bear the burden*, but if he were not obliged to be *more than ordinarily careful*, and bound to answer even for *slight neglect*, few men (for acts of pure generosity and friendship are not here to be supposed) would part with their goods for the

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(5) "Whoever undertakes another man's business, makes it his own; that is, promises to employ upon it the same care, attention and diligence, that he would do if it were actually his own; for he knows that the business was committed to him with that expectation."—Paley's Moral Philosophy, vol. i. b. 3. c. 12. This proposition is laid down with reference to a person acting for a reward, for it is stated to be that which defines the duty of factors, stewards, attorneys, and advocates.

(6) See *Shiells v. Blackburne*, 1 Hen. Bl. 162; post, 53, n. 1. where the doctrine in the text is quoted and sanctioned by Lord Loughborough, C. J.



mere advantage of another, and much inconvenience would consequently be lost in civil society.

This distinction is conformable not only to natural reason, but also, by a fair presumption, to the *intention of the parties*, which constitutes the genuine law of all contracts, when it contravenes no maxim of morals or good government (7); but, when a different intention is *expressed*, the rule (as in devises) yields to it; and a bailee without benefit may, by a special undertaking, make himself liable for *ordinary* or *slight* neglect, or even for inevitable *accident*: hence, as an agreement, *that a man may safely be dishonest*, is repugnant to decency and morality, and as no man shall be *presumed* to bind himself against *irresistible force*, it is a just rule that *every* bailee is responsible for *fraud*, even *though* the contrary be stipulated (8,) but that *no* bailee is responsible for *accident*, *unless* it be most expressly so agreed. [ 11 ]

The plain elements of natural law, on the subject of responsibility for neglect, having been traced by this short analysis, I come to the second, or *historical* part of my Essay; in which I shall demonstrate, after a few introductory remarks, that a perfect harmony subsists on this interesting branch of jurisprudence on the codes of nations most eminent for legal wisdom, particularly of the ROMANS and the ENGLISH. II. The history.

Of all known laws the most ancient and venerable are those of the Jews; and among the *Mosaic* institutions we have some curious rules on the very subject before us; but as they are not numerous enough to compose a system, it will be sufficient to interweave them as we go [ 12 ]

(7) See Sedden v. Senate, 13 East, 74; Rubery v. Jervoise, 1 T. R. 234; Gale v. Reed, 8 East, 39; Roe, ex dem. Earl of Berkeley, 6 East, 104; Iggulden v. May, 7 East, 241.

(8) Non valet si convenerit ne dolus præstetur. D. 15. 17. 43.

along, and explain them in their proper places; for a similar reason, I shall say nothing here of the *Attic* laws on this title, but shall proceed at once to that nation by which the wisdom at *ATHENS* was eclipsed, and her glory extinguished.

Roman law.

The decisions of the old *Roman* lawyers collected and arranged in the sixth century by the order of *JUSTINIAN*,<sup>(9)</sup> have been for ages, and in some degree still are, in bad odour among *Englishmen*: this is an honest prejudice, and flows from a laudable source: but a prejudice most certainly it is, and like all others, may be carried to a culpable excess.<sup>(1)</sup>

The constitution of *ROME* was originally excellent; but when it was *settled*, as historians write, by *AUGUSTUS*, or, in truer words, when that base dissembler and cold-blooded assassin *C. Octavius*<sup>(2)</sup> gave law to millions of

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(9) See Gibbon's History of the Decline and Fall of the Roman Empire, chap. 44; 1 Bl. Com. 80; Taylor's Elements of the Civil Law, 47; Gianone's Hist. of Naples, b. 3. c. 8.

(1) Whatever prejudices may have formerly prevailed, and it is to be hoped, still prevail, against the constitutional maxims of the Roman imperial law, no question surely can now exist upon the propriety of consulting the code of that, or of any other distinguished people, for the purpose of enlarging and liberalizing the mind. The study of these laws, and of the works of many eminent writers upon general law, who have ennobled the science of jurisprudence by their admirable productions, should engage the attention of every student of our own laws. And in some cases a knowledge of their writings is even necessary, since upon novel points of commercial law they are frequently quoted, and become the foundation of the decisions of our courts. See 1 Bl. Com. 5; Halifax's Analysis of the Roman Civil Law, Introduction; Wynne's Eunomus, 142, Bythewood's edition; Abbott on Shipping, Introduction; vide post.

(2) Our author's antipathy to the character of Augustus is also pointedly expressed in a letter to Mr. Gibbon, (Gibb. Post Works) and a principal cause there assigned, namely, the death of Cicero, does equal honor to his sensibilities as a patriot and a man of genius.

honestèr, wiser, and braver men than himself by the help of a profligate army and an abandoned senate, the new form of government was in itself absurd and unnatural; and the *lex regia*, (3) which concentrated in the prince all the powers of the state, both executive and legislative, was a tyrannous ordinance, with the name only, not the nature of a law: (b) had it even been voluntarily conceded, as it was in truth forcibly extorted, it could not have bound the *sons* of those who consented to it; for "a renunciation of *personal* rights, especially rights of "the highest nature, can have no operation beyond the "persons of those who renounce them." Yet, iniquitous and odious as the *settlement* of the constitution was, ULPIAN only spoke in conformity to it when he said that "the will of the prince had the force of law;" that is, as he afterwards explains himself, in the ROMAN empire; for he neither meant, nor could be mad enough to mean, that the proposition was just or true as a general maxim. So congenial, however, was this rule or sentence, ill understood and worse applied, to the minds of our early NORMAN kings, that some of them, according to Sir JOHN FORTESCUE, "were not pleased with "their own laws, but exerted themselves to introduce "the civil laws of *Rome* into the government of ENG- "LAND;" (c) and so hateful was it to our sturdy ancestors, (4) that, if JOHN of SALISBURY be created, "they "burned and tore all such books of civil and canon law "as fell into their hands:" (d) but this was intemperate

(b) D. 1. 4. 1.

(c) De Laud. Leg. Angl. c. 33, 34. (d) Seld. in Fort. c. 33.

(3) See Vinn. in Instit. lib. 1 tit. 2. and Gibbon's Dec. and Fall Rom. Emp. 8vo. edit. vol. 8. c. 44. p. 17. 49.

(4) See 1 Blak. Com. 456. n. k. Hurd's Second Dialogue on the Constitution of England. Barrington's Observations upon the more Ancient Statutes, 76. 2. Ed. 88. 5 Ed.

Distinction between the private and public, the rational and positive laws of Rome.

[ 14 ]

zeal; and it would have been sufficient to improbate the *public*, or *constitutional* maxims of the *Roman* imperial law, as absurd in themselves as well as inapplicable to our free government, without rejecting the whole system of *private* jurisprudence as incapable of answering even the purpose of illustration. Many *positive* institutions of the *Romans* are demonstrated by FORTESCUE, with great force, to be far surpassed in justice and sense by our own immemorial customs; and the rescripts of SEVERUS or CARACALLA, which were laws, it seems, at *Rome*, have certainly no kind of authority at *Westminster*; but, in questions of *rational* law, no cause can be assigned why we should not shorten our own labour by resorting occasionally to the wisdom of ancient jurists, many of whom were the most ingenious and sagacious of men. What is good sense in one age must be good sense, all circumstances remaining, in another; and pure unsophisticated reason is the same in ITALY and in ENGLAND, in the mind of a PAPINIAN and of a BLACKSTONE.

Without undertaking, therefore, in all instances, to reconcile NERVA with PROCULUS, LABEO with JULIAN, and GAIUS either with CELSUS or with himself, I shall proceed to examine a summary of the *Roman* law on the subject of *responsibility for neglect*.

Two famous laws of Ulpian.

The two great sources, whence all the decisions of civilians on this matter must be derived, are *two* laws of ULPIAN; the first of which is taken from his work on *Sabinus*, and the second from his tract on the Edict: of both these laws I shall give a verbal translation according to my apprehension of their obvious meaning, and shall then state a very learned and interesting controversy concerning them, with the principal arguments on each side, as far as they tend to elucidate the question before us.

“Some contracts, says the great writer on *Sabinus*, make the party responsible for DECEIT ONLY; some, for both DECEIT AND NEGLIGENCE. Nothing more than responsibility for DECEIT is demanded in DEPOSITS and POSSESSION AT WILL; both DECEIT AND NEGLIGENCE are inhibited in COMMISSIONS, LENDING FOR USE, CUSTODY AFTER SALE, TAKING IN PLEDGE, HIRING; also in PORTIONS, GUARDIANSHIPS, VOLUNTARY WORK: among these SOME require even more than ordinary DILIGENCE.) PARTNERSHIP and UNDIVIDED PROPERTY make the partner and joint proprietor answerable for both DECEIT AND NEGLIGENCE.”(e)

“In contracts, says the same author in his other work, we are sometimes responsible for DECEIT ALONE; sometimes for NEGLIGENCE ALSO; for DECEIT ONLY in DEPOSITS; because, since NO BENEFIT accrues in the depositary, he can justly be answerable for no more than DECEIT; but if a REWARD happen to be given, then a responsibility for NEGLIGENCE ALSO is required; or, if it be agreed at the time of the contract, that the depositary shall answer both for NEGLIGENCE and for ACCIDENT: but, where A BENEFIT accrues to BOTH parties, as in KEEPING A THING SOLD, as in HIRING, as in PORTIONS, as in PLEDGES, as in PARTNERSHIP, both DECEIT AND NEGLIGENCE make the party liable. LENDING FOR USE, indeed, is for the most part BENEFICIAL to the BORROWER ONLY; and, for this reason, the better opinion is that of Q. MUCIUS, who thought, that HE should be responsible not

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(e) Contractus quidam dolum malum duntaxat recipiunt; quidam, et dolum et culpam. Dolum tantum depositum et precarium; dolum et culpam, mandatum, commodatum, venditum, pignori acceptum, locatum: item dotisdatio, tutelae, negotia gesta: (in his quidam et diligentiam.) Societas et rerum communio et dolum et culpam recipit. D. 50. 17. 23.

“only for NEGLECT, but even for the omission of *more than ordinary DILIGENCE.*”(f)

Critical  
Remarks.

One would scarce have believed it possible, that there could have been two opinions on laws so perspicuous and precise, composed by the same writer, who was indubitably the best expositor of his own doctrine, and apparently written in illustration of each other; the first comprising the rule, and the second containing the reason of it: yet the single passage extracted from the book of SABINUS has had no fewer than twelve particular commentaries in *Latin*,(g) one and two in *Greek*,(h) and some in the *modern languages of EUROPE*, besides the general expositions of that important part of the digest, in which it is preserved. Most of these I have perused with more admiration of human sagacity and industry than either solid instruction or rational entertainment; for these authors, like the generality of commentators, treat one another very roughly on very little provocation, and have the art of rather clouding texts in themselves clear, than of elucidating passages which have any ob-

(f) In contractibus interdum dolum solum, interdum et culpam, praestamus—dolum in deposito—nam, quia nulla utilitas ejus versatur, apud quem deponitur, merito dolum praestatur solus—nisi fortè et merces accessit, tunc enim, ut est et constitutum, etiam culpa exhibetur—aut, si hoc ab initio convenit, ut et culpam et periculum praestet is, penes quem deponitur—sed, ubi utriusque utilitas vertitur, ut in empto, ut in locato, ut in dote, ut in pignore, ut in societate, et dolum et culpa praestatur. Commodatum autem plerumque solam utilitatem continet ejus, cui commodatur—et ideo verior est Q. Mucii sententia existimantis et culpam praestandam et diligentiam. D. 13. 6. 5. 2. (5).

(g) Bocerus, Campanus, D’Avezan, Del Rio, Le Conte, Bittershusius, Giphanius, J. Godefrois, and others.

(h) The scholium on Harmenopolus, 1. 6. tit. de Reg. Jur. n. 55. may be considered as a commentary on this law.

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(5) See Domat. Civ. Law, lib. 1. tit. 1. § 3. and Vinn. in Instit. lib. 3. tit. 15.

scurity in the words or the sense of them. CAMPANUS, indeed, who was both a lawyer and a poet, has turned the first law of *Ulpian* into *Latin* hexameters; and his authority, both in prose and verse, confirms the interpretation which I have just given.

The chief causes of all this perplexity have been, first, the vague and indistinct manner in which the old *Roman* lawyers, even the most eminent, have written on the subject; secondly, the loose and equivocal sense of the words *DILIGENTIA* and *CULPA*; lastly and principally, the darkness of the parenthetical clause *IN HIS QUIDAM ET DILIGENTIAM*, which has produced more doubt, as to its true reading and signification, than any sentence of equal length in any author *Greek* or *Latin*. Minute as the question concerning this clause may seem, and dry as it certainly is, a short examination of it appears absolutely necessary.

The vulgate editions of the Pandects, and the manuscripts from which they were printed, exhibit the reading above set forth; and it has accordingly been adopted by CUJAS, P. FABER, LE CONTE, DONELLUS, and most others, as giving a sense both perspicuous in itself and consistent with the second law; but the FLORENTINE copy has *quidem*, and the copies from which the *Basilica* were translated centuries after JUSTINIAN, appear to have contained the same word, since the *Greeks* have rendered it by a particle of similar import. This variation in a single letter makes a total alteration in the whole doctrine of *ULPIAN*; for, if it be agreed, that *diligentia* means, by a figure of speech, a more than ordinary degree of diligence, the common reading will imply conformably with the second law before cited, that "SOME of the preceding contracts demand that higher degree;" but the *Florentine* reading will denote, in

contradiction to it; that "ALL of them require more than "ordinary exertions."

It is by no means my design to depreciate the authority of the venerable manuscript preserved by *Florence*; for although few civilians, I believe, agree with POLITIAN, in supposing it to be one of the *originals*,<sup>(7)</sup> which were sent by *Justinian* himself to the principal towns of *Italy*,<sup>(i)</sup> yet it may *possibly* be the very book which the Emperor LOTHARIUS II. is *said* to have found at *Amalfi* about the year 1130, and gave to the citizens of *PISA*, from whom it was taken near three hundred years after, by the *Florentines*, and has been kept by them with superstitious reverence :<sup>(k)</sup> (8) be that as it may, the copy

(i) Epist. x. 4. Miscell. cap. 41. See Gravina, lib. i. § 141.

(k) Taurelli, Praef. ad Pand. Florent.

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(7) See Gibbon's Dec. and Fall Rom, Emp. 8vo edit. vol. 8. c. 44. p. 44, 45, and notes.

(8) The texts of the Pandects being almost wholly lost, accident led, some time about the year 1137, to the discovery of a complete copy of them, at Amalphi, a town in Italy, near Salerno. From Amalphi the copy found its way to Pisa, and Pisa having submitted to the Florentines, in 1406, the copy was removed in great triumph to Florence. By the direction of the magistrates of the town, it was immediately bound in a superb manner, and deposited in a costly chest. This copy of it is generally called the Florentine Pandects. Formerly they were shown only by torch light, in the presence of two magistrates, and two Cistercian monks with their heads uncovered. They have been successively collated by Politian, Bolognini, and Antonius Augustinus, and an exact copy of them was published in 1553, by Franciscus Taurellus; for its accuracy and beauty, this edition ranks high among the ornaments of the press; it should be accompanied by the treatise of Antonius Augustinus on the proper names in the Pandects, published by him at Tarragona, in 1579. About the year 1710, Henry Branchman, a Dutchman, was permitted, at the earnest solicitation of our George the First, to collate the manuscript. He employed ten years upon it, and in the investigation of various topics of literature connected with the Justi-



deserves the highest respect; but if any proof be requisite, that it is *no faultless* transcript, we may observe, that, in the very law before us, *agcedunt* is erroneously written for *accidunt*; and the whole phrase, indeed, in which that word occurs, is different from the copy used by the *Greek* interpreters, and conveys a meaning, as [ 20 ] *BOCERUS* and others have remarked, not supportable by any principle or analogy.

This, too, is indisputably clear; that the sentence, *in his* *QUIDEM et diligentiam*, is ungrammatical, and cannot be construed according to the interpretation which some contend for. What verb is understood? *Recipiunt*. What noun? *Contractus*. What then becomes of the words *in his*, namely *contractibus*, unless *in* signify *among*? And in that case, the difference between *QUIDEM* and *QUIDAM* vanishes; for the clause may still import, that “*AMONG* the preceding contracts (that is, *in* *SOME* “*of them*), more than usual diligence is exacted:” in this sense, the *Greek* preposition seems to have been taken by the scholiast on *HARMENOPULUS*; and it may here be mentioned, that *diligentia*, in the nominative, appears in some old copies, as the *Greeks* have rendered it; but *ACCURSIUS*, *DEL RIO*, and a few others, consi-

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nian Code. His elegant and curious *Historia Pandectarum*, published at Utrecht, in 1712, gives an interesting account of his labours; and shows, like the labours of Wetstein and Mill, that great fire of imagination, exquisite taste, minute and patient investigation, and the soundest judgment may be found in the same mind. Some have supposed that the Florentine manuscript is the autograph of the Pandects; for this opinion there is no real ground or authority; but Brenchman refers it to the sixth century, a period not very remote from the era of Justinian. Brenchman's work forms a small part of an original design, and is so ably executed that all must lament his having left any part of his design unfinished. See Butler's *Horæ Juridicæ subsecivæ*, 62.

[ 21 ]

der the word as implying no more than diligence in general, and distinguish it into various *degrees* applicable to the several contracts, which ULPIAN enumerates. We may add, that one or two interpreters thus explain the whole sentence, "in his *contractibus* quidam *jurisconsulti* "et diligentiam requirunt:" but this interpretation, if it could be admitted, would entirely destroy the authority of the clause, and imply, that Ulpian was of a different opinion. As to the last conjecture, that only *certain cases and circumstances* are meant by the word QUIDAM, it scarce deserves to be repeated. On the whole, I strongly incline to prefer the vulgate reading, especially as it is not conjectural, but has the authority of manuscripts to support it; and the mistake of a letter might easily have been made by a transcriber, whom the prefaces, the epigram prefixed, and other circumstances, prove to have been, as Taurelli himself admits, a Greek.(9) Whatever, in short, be the genuine words of this much-controverted clause (1), I am persuaded, that it ought by no means to be strained into an inconsistency with the *second* law; and this has been the opinion of most foreign jurists, from AZO and ALCIAT down

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(9) See Gibbon's Rom. Emp. vol. 8. p. 44. note 87.

(1) Few verbal controversies have been equally important with that on the construction of the disputed sentence in Ulpian's Commentary; for, though the preponderancy of any of the various opinions urged on this subject may have little or no influence on the settled maxims of our law, it must be obvious, that the accuracy of the decision is materially connected with the clearness and arrangement of the general doctrine of bailments; as the Roman jurisprudence is the source from which this general doctrine is derived, the learned and liberal lawyer will acknowledge considerable obligation to Sir William Jones for the acute and well-supported reasoning by which he establishes the true reading of the clause ("in his quidam et diligentiam,") in opposition to fanciful conjecture and dogmatical assertion.

to HEINECCIUS and HUBER ; who, let their dissension be, on other points, ever so great, think alike in distinguishing *three degrees* of neglect, which we may term *gross*, *ordinary*, and *slight*, and in demanding responsibility for those degrees according to the rule before expounded.(2)

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(2) As there are three degrees of diligence, viz. ordinary diligence, extraordinary diligence, and most exact diligence ; so there are three degrees of fault or neglect. *Lata culpa*, a great fault ; *levis culpa*, a small fault ; *levissima culpa*, the smallest fault or neglect. A great fault is a gross and supine negligence ; as not to understand what all men are supposed to understand. Thus it is, if a man should not observe what was publicly proclaimed ; or when one alone is ignorant of all that which all in the city besides him are well acquainted with ; or when one leaves open his doors in the night time. A fault of this nature is said to be next to deceit, and sometimes termed absolutely so ; though it is not truly deceit, but only by the presumption of law. A small fault, is that sort of negligence where a man does not take such care about the concerns of other men, as discreet and diligent men make use of about their own affairs ; and this is esteemed a culpable neglect, though this person is not more diligent about concerns that are his own. Thus it is, when one leaves open the upper windows of his house, whereby thieves with ladders enter and steal the goods of another man, which were pawned or lent. The smallest fault or neglect is, when a man does not take that care which the most exact and most diligent men are wont to do ; as when a man suffers a thing in his custody to be stolen, which might some way or other have been prevented ; as, not to fix bars in the upper windows of those chambers which are remote from the family, and toward the street.

If there is no particular agreement, these rules will instruct what diligence is required to make an act not culpable. First, in contracts to the advantage of the giver only, the receiver is answerable only for deceit, and a great fault or neglect, as in the case of a depositum, or any moveable thing delivered to a friend to be kept for him. 2dly. When a contract is made for the sake of the receiver only, there deceit, and every fault, even the smallest, will affect, as in the case of a thing lent. 3dly. If the contract is both for the sake of the giver and receiver, there the person guilty of deceit, a great or small fault, must

The law, then, on this head, which prevailed in the ancient *Roman* empire, and still prevails in *Germany, Spain, France, Italy, Holland*, constituting, as it were, a part of the law of nations, is in substance what follows.

Definitions  
and rules.

[ 22 ]

GROSS neglect, *lata culpa*, as the *Roman* lawyers most accurately call it, *dolo proxima*, is in practice considered as equivalent to DOLUS, or FRAUD, itself; and consists, according to the best interpreters, in the omission of that care, *which even inattentive and thoughtless men never fail to take of their own property*: this fault they justly hold a violation of good faith.

ORDINARY neglect, *levis culpa*, is the want of that diligence which the generality of mankind use in their own concerns; that is, of ordinary care.

SLIGHT neglect, *levissima culpa*, is the omission of that care which very attentive and vigilant persons take of their own goods, or, in other words, of very exact diligence.

Now, in order to ascertain the degree of neglect, for which a man, who has in his possession the goods of another, is made responsible by his contract, either express or implied, civilians establish three principles, which they deduce from the law of *Ulpian* on the *Edict*; and here it may be observed, that they frequently distinguish this law by the name of *Si ut certo*, and the other by that of *Contractus*; (1)(3) as many poems and histories in ancient languages are denominated from their initial words.

(1) Or l. 5. § 2. ff. *Commod.* and l. 23. ff. *de reg. jur.* Instead of ff, which is a barbarous corruption of the initial letter of *παρόξῃαι*, many write D, for *Digest*, with more clearness and propriety.

bear the blame and damages; as in selling, letting to hire, the case of a pledge, and of partnership. See Wood's *Institutes of the Civil Law*, 106. where the reference to the *Digest*, from which these principles are derived, are pointed out. *Halifax's Analysis of the Roman Civil Law*. 61.

(3) It may not be amiss, for the sake of beginners, to explain here

First, in contracts which are beneficial *solely* to the owner of the property holden by another, no more is demanded of the holder than *good faith*, and he is consequently responsible for nothing less than *gross* neglect ;(A) this, therefore, is the general rule in DEPOSITS ;(4) but, in re-

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the method of quoting the several parts which now compose the *Corpus Juris Romano-Civilis*. The institutions are contained in four books, each book is divided into titles, and each title into paragraphs, of which the first described by the letters, Pr. or princip. is not numbered. The Digests, or Pandects, are in fifty books, each book is distributed into titles, each title into laws, and very frequently laws into paragraphs, of which the first is not numbered. The code is comprised in twelve books, each of which is divided, like the digests, into titles and laws ; and sometimes, laws into paragraphs. The novels are distinguished by their number, chapter, and paragraphs.

The old way of quoting was much more troublesome, by only mentioning the number or initial words of the paragraph or law, without expressing either the number of the book or title. Thus, § *Si adversus* 12. *Inst. de Nuptiis*, means the 12th paragraph of the title in the "Institutions de Nuptiis," which paragraph begins with the word, *Si adversus* ; and which a modern civilian would cite thus, I. 1. 10. 12. So I. 30. D. de R. J. signifies the 30th law of the title in the *Digests de Regulis Juris*, according to the modern way, thus, D. 50. 17. 39. Again, l. 5. § 3. ff. *de jurejur.* means the 3d paragraph of the 5th law of the title in the *Digests de Jurejurando* : better thus, D. 12. 2. 5. 3. And here note, that the Digests are sometimes referred to, as in the last instance, by a double f, and at other times by the Greek  $\pi$  or  $\pi$ . Halifax's Analysis of the Roman Civil Law, 2. 2 ed. Taylor's Elements of the Civil Law, 24. 2 ed. See Gibbon's Rom. Emp. vol. 8. p. 2, note 1, for an obvious improvement on the old and confused manner of referring to the civil law.

(4) A deposit, in the civil law, is a contract, by which a thing is committed to the custody of one, to be kept without reward, upon condition that the same thing shall be returned when he that deposits the

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[(A) There is an exception to this rule, where the bailee by special agreement extends his liability. The above rule only applies to cases where the law fixes the liability. Ld. Raym. 910.]

gard to COMMISSIONS, or, as foreigners call them, MANDATES,(5) and the *implied contract, negotiorum gestorum*,

thing shall demand it. Wood's Institutes of the Civil Law, 216. D. 16. 3. 1. 8. It must be gratuitous; for otherwise it would be a hiring and letting to hire, where the depositary would let out his care. Domat's Civil Law, part I. b. 1. t. 7. s. 3. Wood's Inst. 218. The depositary is bound to take the same care of the things deposited as he does of his own, and to return them, paying only for the damages committed through deceit, or a gross neglect, for it was designed to be no advantage to him, but rather a burden. As to a small neglect, he that deposited may complain of his own easiness and inconsideration, that he should put a trust in a person that was not so circumspect as he intended. Inst. 3. 15. 3. D. 50. 17. 23. Grotius, b. 2. c. 12. s. 13. Puf. b. 5. c. 4. s. 7. Domat's Civil Law, b. 1. t. 7. s. 3. Wood's Inst. of the Civil Law, 218. Eden's Elementa Juris Civilis, 175.

By the Code Napoleon, art. 1927, a depositary is bound to exercise the same degree of care which he employs in his own affairs. But this rule is applied, art. 1928, with greater strictness, First, if the depositary has voluntarily offered to take charge of the deposit. 2dly. If he has stipulated for a reward. 3dly. If the deposit has been made solely for the benefit of the depositary. 4thly. If it has been expressly agreed, that the depositary shall answer for every description of default. A depositary is not responsible, art. 1929, for injuries resulting from irresistible force, unless he has been placed in legal default, *en demeure*, for not restoring the deposit.

The various degrees of care required by the civil law from different bailees, and referred to in this, and in the following notes, will be found to correspond with the law of England; for the general principles discussed and established in this Essay, which govern the different cases of bailment, are, in various instances, susceptible of modification upon proof of the character of the particular bailee, and the care he exercises in his own affairs. See post, p. 47. The use of superlatives also, which is not uncommon in the civil law, in speaking upon subjects of this nature, but which is rejected in this Essay, would appear to require a greater degree of care than is actually demanded; but in many cases they are interpreted to convey only a positive signification; and, in others, they imply no more than an ordinary degree of care. See Vin-  
nius in Inst. 3. 25. 5. n. 2. post 87.

(5) A mandate is a contract by which an affair is committed to the management of another, and by him undertaken to be performed gratis.

a certain care is requisite from the nature of the thing; and as good faith itself demands, that such care be proportioned to the exigence of each particular case, the law presumes, that the mandatary or commissioner, and, by parity of reason, the *negotiorum gestor*, engaged at the time of contracting to use a degree of diligence adequate to the performance of the work undertaken.(m)

Secondly, in contracts reciprocally beneficial to both parties, as in those of SALE,(6) HIRING,(7) PLEDG-

.(m) Spondet diligentiam, say the Roman lawyers, gerendo negotio parem.

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He is bound, both in duty and honour, to take care of the affairs which he has undertaken to look after, and to manage them not only with integrity, but with diligence and exactness. Although he is negligent in his own affairs, yet he ought to have more circumspection in the concerns of others, which he undertakes to manage, than in his own; and he is accountable for the damage which his negligence may have occasioned, but not for accidents. Domat's Civil Law, part I. b. 1. t. 15. s. 3. Wood's Institute of the Civil Law, 242. Inst. 3. 27. D. 16. 3. 1. 9. Grotius, b. 2. c. 12. s. 13. Puf. b. 5. c. 4. s. 3. Code Napoleon, Code Civil, l. 3. tit. 13. ch. 1, 2.

(6) A sale, according to the civil law, was perfected by the bare consent of the parties, where the price was agreed upon, although the thing sold was not delivered, nor the price paid, and the property immediately passed to the buyer; but he was not entitled to a delivery and possession of the property without first paying the price, or otherwise satisfying the seller. Inst. 3. 2. 4. Domat's Civil Law, part I. b. 1. tit. 2. s. 1 and 2. Puf. b. 5. c. 5. s. 2. Wood's Institute of the Civil Law, 230. Eden's Elementa Juris Civilis, 190. See post 86. n.

By the Code Napoleon, art. 1651, when the time and mode of payment is not fixed by the terms of the sale, the price must be paid at the time and place of delivery.

During this intermediate period, between the completion of the sale, and the actual delivery of the article sold, the property was at the risk of the buyer; and, on the other hand, he was entitled, upon principles of equal justice, to whatever benefit might accrue to it during that time. Inst. 3. 24. 3. But since the contract was mutually beneficial to the buyer and seller, the latter was bound to exercise ordinary care

ING,(8) PARTNERSHIP,(9) and the contract implied in JOINT PROPERTY, such care is exacted as every prudent

in reserving the article, and was responsible for losses which arose from his negligence. Inst. 3. 24. 3. D. 18. 6. 8. Grotius, b. 2. c. 12. s. 15. Puf. b. 5. c. 5. s. 5. Domat's Civil Law, part 1. b. 1. tit. 2. s. 3.

(7) *Locatio-conductio*, is a contract whereby the use of a thing, or the service and labour of a person is gained for some time for a certain reward.—Wood's Institute of the Civil Law, 235, 236. Inst. 3. 25. 5. D. 19. 2. Puf. b. 5. c. 6. s. 2. Gro. b. 2. c. 12. s. 18. Domat's Civil Law. p. 1. b. 1. tit. 4. This contract consists of many branches, but it will be sufficient to remark those which more particularly relate to this Essay, and in which goods are the subject of bailment. Artificers are responsible for injuries occasioned by their ignorance; and are responsible if the thing be stolen, burnt, or damaged for want of having been laid up in a secure place, or for not being carefully looked after, or if it be delivered to a wrong person by mistake. Domat's Civil Law, part 1. b. 1. tit. 4. s. 8.

The engagement between an innkeeper and a traveller is usually formed without any express covenant, by the traveller's bare entry into the inn, and depositing his baggage in the hands of the master of the inn, or of those whom he appoints to take care of them. The innkeeper is responsible for the acts of his family, and of his domestics, according to the functions in which they are employed. To avoid collusion, he is answerable for thefts, and is bound to take all possible care of goods entrusted to them, and is only discharged from what may happen by such accidents as the greatest care could not have prevented.—Domat's Civil Law, part 1. b. 1. t. 16. s. 1. Code Napoleon, art. 1953.

In the same manner the master of a ship, or other vessel, who undertakes to carry goods and merchandize by sea, or those who undertake the carriage of goods by land or water, are answerable for the baggage and goods which they take charge of, and are responsible in the same manner as innkeepers.—Domat's Civil Law, part 1. b. 1. tit. 16. s. 2.

The Code Napoleon upon commerce, art. 103, makes the carrier responsible for the damage or loss of goods in every case, except where the damage arises from some vice inherent in the article, or where the loss or damage arises from irresistible force. With the former exemption our law corresponds; for if game or poultry become tainted and



*man commonly takes of his own goods; and, by consequence, the vendor, the hirer, the taker in pledge, the partner, and the co-proprietor, are answerable for ordinary neglect.*

Thirdly, in contracts, from which a benefit accrues only to him who has the goods in his custody, as in that of LENDING FOR USE,(1) an *extraordinary* degree of care

unfit for food, in the ordinary course of the journey, the carrier is not responsible. But the exemption from irresistible force is more extensive than that which is given by the law of England, for the carrier is answerable for losses occasioned by tumultuous bodies of people, and every other case, except where they arise from the act of God, or of the king's enemies.

(8) A pledge creates a contract, in which a thing is given by the debtor to the creditor for security of the debt, upon condition that when the debt is paid, the same thing in specie shall be returned. And since the contract is reciprocally beneficial, to the debtor, by procuring him an advance of money, and to the creditor, by securing to him the repayment, the creditor is bound to exercise that degree of care which prudent men generally employ in their own affairs.—Inst. 3. 15. 4. with Vinnius's notes. Domat on the Civil Law, part 1. b. 3. tit. 1. Puf. b. 5. c. 10. s. 13. Wood's Institute of the Civil Law, 219. D. 13. 7. 14.

(9) A partnership is a contract, where money, goods, or labour are put in common, that each may share in the gain and loss, in proportion to his contribution.—Puf. b. 51 c. 8. s. 1. Wood's Institute of the Civil Law, 240. Inst. 3. 26. The care and vigilance which the partners owe to one another, is regulated by the care which they have of what is their own, and does not extend to the greatest exactness that the most careful and diligent persons are capable of, but is limited to make them responsible for all deceit and for all gross faults. For it is sufficient, if they exercise, with reference to the partnership property, the same diligence which they employ in their own affairs. And if a partner exercises this degree of care, he will not be responsible for a slight fault, for the other partners ought to blame themselves for not having made choice of a more careful partner. Domat's Civil Law, b. 1. tit. 3. s. 4. Inst. 3. 26. 9. with Vinnius's notes. D. 17. 2. 52. 4. Puf. b. 5. c. 8. s. 2. Gro. b. 2. c. 12. s. 24.

(1) A *commodatum* is a contract in which a thing is granted gratis to

is demanded; and the *borrower* is, therefore, responsible for *slight negligence*.

[ 24 ]

This had been the learning generally, and almost unanimously, received and taught by the doctors of *Roman law*; and it is very remarkable, that even ANTOINE FAVRE, or *Faber*, who was famed for innovation and paradox, who published two ample volumes, *De Erroribus Interpretum*, and whom GRAVINA justly calls the *boldest of expositors and the keenest adversary of the practisers*,<sup>(n)</sup> discovered no error in the common interpretation of two celebrated laws, which have so direct and so powerful an influence over social life, and which he must repeatedly have considered: but the younger GODEFROI, of *Geneva*, a lawyer confessedly of eminent learning, who died about the middle of the last century, left behind him

(n) Orig. Jur. Civ. lib. i. § 183.(2)

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another for a certain use, upon condition, that, after the use of it, the same thing shall be returned in as good plight as it was when it was first delivered. The borrower is not responsible for injuries which happen in the use of the article for the purpose and during the time for which it was lent, for the lender has tacitly consented not to demand any indemnity upon that account. Puf. b. 5. c. 4. s. 6. Wood's Institute of the Civil Law, 215. But he is bound not merely to exercise that degree of diligence which he employs in his own transactions, but that care which very diligent persons employ in their own affairs, and is consequently answerable for whatever losses may happen for want of such care. Inst. 3. 15. 2. Domat's Civil Law, part 1. b. 1. tit. 5. s. 2. Puf. b. 5. c. 4. s. 6. Gro. b. 2. c. 12. s. 13.

(2) The whole of Gravina's animadversion deserves to be quoted for the implied and salutary lesson it offers to the juvenile Quixotes, whose paradoxical weapons are frequently displayed with such exulting confidence in the field of literary controversy:—"Tandem in Antonio Fabro consistam audacissimo, et pragmaticorum hoste vehementissimo: mo: qui aliis quidem in operibus acumen magis, quam veritatem præstitit: in codice vero suo usum rerum, et ingenii sui jam maturi reddidit nobis utilitatem: ut meliora sint illius, quæ minus acuta."

a regular *commentary* on the law *Contractus*, in which he boldly combats the sentiments of all his predecessors, and even of the ancient *Romans*, and endeavours to support a new system of his own.

He adopts, in the first place, the *Florentine* reading, System of J. Godefroi. of which the student, I hope, has formed, by this time, a decided opinion from a preceding page of this Essay.

He censures the rule comprised in the law *Si ut certo* as weak and fallacious, yet admits, that the rule, which he condemns, had the approbation and support of *MO-DESTINUS*, of *PAULUS*, of *AFRICANUS*, of *GAIUS*, and of the great *PAPINIAN* himself; nor does he satisfactorily prove the *fallaciousness* to which he objects, unless every rule be fallacious to which there are some exceptions. He understands by *DILIGENTIA*, that care which a *very attentive and vigilant man* takes of his own property; and he demands this care in *all* the eight contracts, which immediately precede the disputed clause; in the *two* which follow it, he requires no more than *ordinary* diligence. He admits, however, the *three* degrees of neglect above stated, and uses the common epithets, *levis* and *levissima*; but, in order to reconcile his system with many laws which evidently oppose it, he ascribes to the old lawyers the wildest mutability of opinion, and is even forced to contend, that *ULPAN* himself *must have changed his mind*. [ 25 ]

Since his work was not published, I believe, in his life-time, there may be reason to suspect, that he had not completely settled *his own* mind; and he concludes, indeed, with referring the decision of every case on this head to that most dangerous and most tremendous power, (3) *the discretion of the judge.* (o)

(o) "Ergo certè hac in re censentibus accedo, vix quidquam generalius "definiri posse—remque hanc ad arbitrium judicis, prout res est, referendam." p. 141.

System of  
Zasius and  
Donellus.

[ 26 ]

The *triple* division of neglects had also been highly censured by some lawyers of reputation. ZASIUS had very justly remarked, that neglects differed in *degree*, but not in *species*: adding, "that he had no objection to the use of the words *levis* and *levissima*, merely as terms of practice adopted in courts, for the more easy distinction between the different degrees of care exercised in the performance of different contracts:"(p) but DONELLUS, in opposition to his master *Duaren*, insisted that *levis* and *levissima* differed in sound only, not in sense; and attempted to prove his assertion triumphantly by a regular syllogism;(q) the minor proposition of which is raised on the figurative and inaccurate manner, in which positives are often used for superlatives, and conversely, even by the best of the old Roman lawyers. True it is, that, in the law *Contractus*, the division appears to be *twofold* only, DOLUS and CULPA; which differ in *species*, when the first means *actual fraud and malice*, but in *degree* merely when it denotes no more than *gross neglect*; and, in either case, the second branch, being capable of *more and less*, may be subdivided into *ordinary* and *slight*; a subdivision

(p) Zas. Singul. Resp. lib. i. cap. 2.

(q) "Quorum definitiones eadem sunt, ea inter se sunt eadem—*levis* autem culpae et *levissimae* una et eadem definitio est—utraque igitur culpa eadem." Comm. Jur. Civ. lib. xvi. cap. 7.

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(3.) In the language of an eminent judge, The discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper, and passion. In the best it is oftentimes caprice; in the worst, it is every vice, folly, and passion to which human nature is liable. *Vide* Ld. Camden's Argument in the case of Doe v Kersey, Pasch. 5 Geo. 3. 1765. C. P. Fearn, Ex. Devises. Butler's ed. 535. See also, Paley's Moral and Political Philosophy, vol. 2. p. 243.

which the law *Si ut certo* obviously requires : and thus are both laws perfectly reconciled.

We may apply the same reasoning, changing what should be changed, to the *triple* division of *diligence* : for, when *good faith* is considered as implying, at least, the exertion of *slight* attention, the other branch, *Care*, is subdivisible into *ordinary* and *extraordinary* ; which brings us back to the number of degrees already established [ 27 ] both by the analysis and by authority.

Nevertheless, a system, in one part entirely new, was broached in the present century by an advocate in the Parliament of PARIS, who may, probably, be now living, and, possibly, in that professional station, to which his learning and acuteness justly entitle him. I speak of M. LE BRUN, who published, not many years ago, an *Essay on Responsibility for Neglect*,<sup>(r)</sup> which he had nearly finished before he had seen the Commentary of *Godefroi*, and, in all probability, without ever being acquainted with the opinion of *Donellus*. System of  
Le Brun.

This author sharply reproves the *triple* division of neglects, and seems to disregard the rule concerning a benefit arising to *both*, or to *one*, of the contracting parties ; yet he charges *Godefroi* with a want of due clearness in his ideas, and with a palpable misinterpretation of several laws. He reads in his *quidam et diligentiam* ; and that with an air of triumph ; insinuating, that *quidam* was only an artful conjecture of *Cujas* and *Le Conte* for the purpose of establishing *their* system ; and he supports his own reading by the authority of the *BASILICA* ; an authority, which, on another occasion, he depreciates. He derides the absurdity of *permitting negligence* in any contract, and urges, that such *permission*, as he calls it, is against express law : “ Now,” says [ 28 ]

(r) *Essai sur la Prestation des Fautes*, a Paris, chez Saugrain, 1764.

he, "where a contract is beneficial to both parties, the "doctors permit *slight negligence*, which, how slight "soever, is still *negligence*, and ought always to be inhibited." He warmly contends that the ROMAN laws, properly understood, admit only *two* degrees of diligence; one, measured by that which a *provident and attentive father of a family* uses in his own concerns; another, by that care which the *individual party*, of whom it is required, is *accustomed to take of his own possessions*; and he, very ingeniously, substitutes a new rule in the place of that which he rejects; namely, that *when the things in question are the SOLE property of the person to whom they must be restored*, the holder of them is obliged to keep them with the *first* degree of diligence; whence he decides, that a *borrower* and a *hirer* are responsible for precisely the same neglect; that a vendor, who retains for a time the custody of the goods sold, is under the same obligation, in respect of care, with a man who undertakes to manage the affairs of another, either *without* his request as a *negotiorum gestor*, or *with* it, as a *mandatary*; "but," says he, "*when the things are the JOINT property of the parties contracting*, no "higher diligence can be required than the second degree, or that which the *acting party* commonly uses "in *his own* affairs; and it is sufficient, *if he keep them as he keeps his own*." This he conceives to be the distinction between the *eight* contracts, which precede, and the *two*, which follow, the words in *his quidem et diligentiam*.

[ 29 ]

Throughout his work he displays no small sagacity and erudition, but speaks with too much confidence of his own decisions, and with too much asperity or contempt of all other interpreters from BARTOLUS to VINNIUS.

At the time when this author wrote, the learned M. POTHIER was composing some of his admirable *Treatises* on all the different species of express or implied *contracts*; and here I seize, with pleasure, an opportunity of recommending those treatises to the *English* lawyer, exhorting him to read them again and again; for, if his great master LITTLETON has given him, as it must be presumed, a taste for luminous method, apposite examples, and a clear manly style, in which nothing is redundant, nothing deficient, he will surely be delighted with works, in which all those advantages are combined, and the greatest portion of which is law at *Westminster* as well as at *Orleans*:<sup>(3)</sup> for my own part, I am so charmed with them, that, if my undissembled fondness for the study of jurisprudence were never to produce any greater benefit to the public, than barely the introduction of POTHIER to the acquaintance of my countrymen, I should think that I had in some measure discharged the debt which *every man*, according to Lord COKE,<sup>(4)</sup> owes to his profession.

[ 30 ]

To this venerable professor and judge, for he had sustained both characters with deserved applause, LE BRUN sent a copy of his little work; and M. POTHIER honoured it with a short, but complete, answer in the

Vindication of  
the old system  
by Pothier.

(3) *Oeuvres de M. Pothier*, a Paris, chez Debure—28 volumes in duodecimo, or 6 in quarto. The illustrious author died in 1772.<sup>(3)</sup>

(3) See the treatise on the law of obligations or contracts, by M. Pothier, translated from the French, with an introduction, appendix, and notes, illustrative of the English law on the subject, to which the eulogium of M. Pothier, pronounced upon his decease, in the University of Orleans, is prefixed, by the late Sir William David Evans, recorder of Bombay.

(4) 8th Rep. pref. p. 34.

form of a *General Observation on his Treatises*; (t) declaring, at the same time, that *he would not enter into a literary contest*, and apologizing for his fixed adherence to the ancient system, which he politely ascribes to the *natural bias of an old man in favour of opinions formerly imbibed*. This is the substance of his answer: "That  
 " he can discover no kind of absurdity in the usual division of *neglect and diligence*, nor in the *rule*, by which  
 " different *degrees* of them are applied to different contracts; that, to speak with strict propriety, negligence  
 " is not *permitted* in any contract, but a *less rigorous construction* prevails in some than in others; that a  
 " *hirer*, for instance, is not considered as *negligent*, when  
 " he takes the same care of the goods hired, which the  
 " generality of mankind take of their own; that the  
 " *letter to hire*, who has his reward, must be presumed to  
 " have demanded at first no higher degree of diligence,  
 " and cannot justly complain of that *inattention*, which in  
 " another case might have been culpable; for a *lender*,  
 " who has no reward, may fairly exact from the borrower that *extraordinary degree* of care, which a *very*  
 " *attentive person of his age and quality* would certainly  
 " have taken; that the diligence which the INDIVIDUAL  
 " party *commonly uses in his own affairs*, cannot properly  
 " be the object of judicial inquiry; for *every trustee*,  
 " administrator, partner, or co-proprietor, must be *presumed* by the court, auditors, or commissioners, before  
 " whom an account is taken, or a distribution or partition made, to use in *their own concerns* such diligence  
 " as is commonly used by *all prudent men*; that it is a  
 " violation of *good faith* for any man to take less care of  
 " another's property, which has been intrusted to him,

[ 31 ]

(t) It is printed apart, in fourteen pages, at the end of his Treatise on the Marriage-contract.



"*than of his own*; that, consequently, the author of  
 "the new system demands no more of a *partner* or a  
 "joint-owner than of a *depository*, who is bound to keep  
 "the goods deposited *as he keeps his own*; which is di-  
 "rectly repugnant to the indisputable and undisputed  
 "sense of the law *Contractus*."

I cannot learn whether M. LE BRUN ever published a reply, but am inclined to believe that his system has gained very little ground in *France*, and that the old interpretation continues universally admitted on the Continent both by theorists and practisers.

[ 32 ]

Nothing material can be added to POTHIER'S argument, which, in my humble opinion, is unanswerable; but it may not be wholly useless to set down a few general remarks on the controversy: particular observations might be multiplied without end.

The only *essential* difference between the systems of GODEFROI and LE BRUN relates to the *two* contracts, which follow the much-disputed clause; for the *Swiss* lawyer makes the partner and co-proprietor answerable for *ordinary* neglect, and the *French* advocate demands no more from them than *common honesty*: now, in this respect, the error of the *second* system has been proved to demonstration; and the author of it himself confesses ingenuously, that the other part of it fails in the article of *Marriage-portions*.<sup>(u)</sup>

Observations  
on Le Brun.

In regard to the division of neglect and care into *three* degrees or *two*, the dispute appears to be merely verbal; yet, even on this head, LE BRUN seems to be self-confuted: he begins with engaging to prove "that only *two* degrees of fault are distinguished by the laws of *Rome*," and ends with drawing a conclusion, that they acknow-

(u) See p. 71. note—and p. 126.

[ 33 ]

ledge but *one* degree: now, though this might be only a slip, yet the whole tenor of his book establishes *two* modes of *diligence*, the *omissions* of which are *as many* neglects; exclusively of *gross* neglect, which he likewise admits, for the *culpa levissima* only is that which he repudiates. It is true, that he gives no epithet or name to the omission of the *second* mode of care; and, had he searched for an epithet, he could have found no other than *gross*; which would have demonstrated the weakness of his whole system.(v)

The disquisition amounts, in fact, to this; from the barrenness or *poverty*, as LUCRETIVS (5) calls it, of the *Latin* language, the single word *CULPA* includes, as a generic term, various degrees or shades of *fault*, which are sometimes distinguished by epithets, and sometimes left without any distinction; but the *Greek*, which is rich and flexible, has a term expressive of almost every shade, and the translators of the law *Contractus* actually use the words *ῥαθυμία* and *ἀμελῆα*, which are by no means synonymous, the former implying a certain *easiness of mind*, or *remissness of attention*, while the second imports a higher and more culpable degree of *negligence* (w). This observation, indeed, seems to favour the system of *Godefroi*; but I lay no great stress on the mere words of the translation, as I cannot persuade myself, that the *Greek*

(v) See pages 32. 73. 74. 149.

(w) *Basilica*, 2. 3. 23. See *Demosth.* 3 *Phil.* Reiske's edit. I. 112. 3. For *levissima culpa*, which occurs but once in the whole body of Roman law, *ῥαθυμία* seems the proper word in Greek; and it is actually so used in the *Basilica*, 60. 3. 5. where mention is made of the *Aquilian law*, in qua, says *Ulpian*, et *livissima culpa* venit. D. 9. 2. 44.

(5) *De Rer. Nat. lib. 1. line 140.*

jurists under BASILIUS and LEO were perfectly acquainted with the niceties and genuine purity of their language ; and there are invincible reasons, as, I hope, it has been proved, for rejecting all systems but that which POTHIER has recommended and illustrated.

I come now to the laws of our own country, in which English law. the same distinctions and the same rules, notwithstanding a few clashing authorities, will be found to prevail ; and here I might proceed chronologically, from the oldest *Year-book*, or *Treatise*, to the latest adjudged *Case* ; but, as there would be a most unpleasing dryness in that method, I think it better to examine separately every distinct *species*,<sup>(6)</sup> observing, at the same time, under each head, a kind of historical order. It must have occurred to the reader, that I might easily have taken a wider field, and have extended my inquiry to every possible case, in which a man possesses for a time the goods of another ; but I chose to confine myself within certain limits, lest, by grasping at too vast a subject, I should at last be compelled, as it frequently happens, by accident or want of leisure, to leave the whole work unfinished : it will be sufficient to remark, that the rules are in general the same, by whatever means the goods are legally in the hands of the possessor, whether by delivery from the owner, which is a proper *bailment*, or from any other person, by finding,<sup>(x)</sup> or in consequence of some distinct contract.

[ 35 ]

Sir JOHN HOLT, whom every Englishman should mention with respect, and from whom no English lawyer Lord Holt's division of Bailments.

(x) Doct. and Stud. dial. 2. ch. 38. Lord Raym. 909. 917. See Ow. 141. 1 Leon. 224. 1 Cro. 219. Mulgrave and Ogden.

(6) See Gibbon's Rom. Emp. vol. 8. p. 84, 85. 87.

should venture to dissent, without extreme diffidence, has taken a comprehensive view of this whole subject in his judgment on a celebrated case,(7) which shall soon be cited at length; but, highly as I venerate his deep learning and singular sagacity, I shall find myself constrained, in some few instances, to differ from him, and shall be presumptuous enough to offer a correction or two in part of the doctrine, which he propounds in the course of his argument.(y)

His division of bailments into six sorts appears, in the first place, a little inaccurate; for, in truth, his *fifth* sort is no more than a branch of his *third*, and he might, with equal reason, have added a *seventh*, since the *fifth* is capable of another subdivision. I acknowledge, therefore, but *five* species of bailment, which I shall now enumerate and define, with all the *Latin* names, one or two of which Lord *Holt* has omitted. 1. DEPOSITUM, which is a naked bailment, without reward, of goods, to be *kept* for the bailor. 2. MANDATUM, or *commission*, [B] when the mandatary undertakes, without recompence, to *do some act* about the things bailed, or simply to *carry* them; and hence Sir HENRY FINCH divides bailment into *two* sorts, to *keep*, and to *employ*.(z) 3. COMMODATUM, or *loan for use*, [C] when goods are bailed, without pay, to be *used* for a certain time by the

[ 36 ]  
New division  
and defini-  
tions.

(y) Lord Raym. 912.

(z) Law, b. 2. ch. 18.

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(7) Coggs v. Bernard, 2 Lord Raym. 909. See post, p. 58. and the case at full in the Appendix.

[(s) This is Lord Holt's 6th division. Lord Ray. 913. Pow. on Con. 254. Bul. N. P. 73.]

[(c) A distinction must be observed between this kind of bailment;

bailee. 4. *PIGNORI ACCEPTUM*; when a thing is bailed by a debtor to his creditor in *pledge*, or as a security for the debt. 5. *LOCATUM*, or *hiring*, which is always for a reward; and this bailment is either, 1. *Locatio rei*, by which the hirer gains the temporary use of *the thing*; or, 2. *Locatio operis facienda*, when *work and labour*, or *care and pains*, are to be performed or bestowed on the thing delivered; or, 3. *Locatio operis mercium vehendorum*, when goods are bailed for the purpose of being carried from place to place, either to a *public carrier*, or to a *private person*.(8)

1. The most ancient case that I can find in our books Law of deposits. on the doctrine of *DEPOSITS* (there were others, indeed; a few years earlier, which turned on points of pleading,) was adjudged in the eighth of Edward II. and is abridged by *Fitzherbert*.(a) It may be called *BONION'S case*, [ 37 ] Bonion's case. from the name of the plaintiff, and was, in substance, this:—An action of *detinue* was brought for *seals, plate, and jewels*, and the defendant pleaded, “that the plaintiff had bailed to him a chest *to be kept*, which chest “was *locked*; that the bailor himself took away the key, “without informing the bailee of the contents; that rob-

(a) *Mayn. Edw. II. 275. Fitz. Abr. tit. Detinue, 59.*

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and what is called *mutuum*: this last is a loan, and generally gratuitous; but it is for consumption, to be repaid in property of the same kind, but not in the specific property: this is not strictly a bailment, as the absolute property is transferred to the borrower immediately on delivery, and if a loss happen, in any way, he must bear it. *Doct. and Stud. 222.*]

(8) This division and classification of the different species of bailment will be considered by the student of the English law, as preferable both to Lord Holt's Analysis and the Order of the Imperial Institutes. See *Vinnius in Instit. lib. 3. tit. 15.*

"bers came in the NIGHT, *broke open the defendant's chamber*, and carried off the chest into the fields, where they forced the lock, and took out the contents; that the defendant was robbed at the same time of his own goods." The plaintiff replied, "that the jewels were delivered, in a chest *not locked*, to be restored at the pleasure of the bailor;" and on this, it is said, *issue was joined*.

Upon this case Lord Holt observes, "that he cannot see, why the bailee should not be charged with goods in a chest, as well as with goods out of a chest; for," says he, the bailee has as little power over them, as to any benefit that he might have from them, and as great power to defend them in one case as in the other." (b) The very learned judge was dissatisfied, we see, with Sir Edward Coke's reason, "that, when the jewels were locked up in a chest, the bailee was not, in fact, trusted with them." (c) Now, there was a diversity of opinion upon this very point, among the greatest lawyers of Rome; for "it was a question, whether, if a box sealed up had been deposited, the box only should be demanded in an action, or the clothes which it contained should also be specified; and TREBATIUS insists, that the box only, not the particular contents of it, must be sued for; unless the things were previously shown, and then deposited: but LABEO asserts, that he who deposits the box, deposits the contents of it; and ought, therefore, to demand the clothes themselves. What, then, if the depositary was ignorant of the contents? It seems to make no great difference, since he took the charge upon himself; and I am of opinion," says Ulpian, that, although the box was sealed up, yet

(b) Lord Raym. 914.

(c) 4 Rep. 84.

"an action may be brought for what it contained." (d) This relates chiefly to the form of the libel; but surely cases may be put, in which the difference may be very material as to the *defence*. (9) Diamonds, gold, and precious trinkets, ought, *from their nature*, to be kept with peculiar care under lock and key; it would, therefore, be gross negligence in a depositary to leave such a deposit in an open antichamber, and *ordinary* neglect, at least, to let them remain on his table, where they might possibly tempt his servants; but no man can proportion his care to the *nature* of things, without knowing them; perhaps, therefore, it would be no more than *slight* neglect, to leave out of a drawer a box or casket, which was neither known, nor could justly be suspected, to contain diamonds; and DOMAT. (1) who prefers the opinion of *Trebatius*, decides, "that, in such a case, the depositary would only be obliged to restore the casket, as it was

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(d) D. 16. 3. 1. 41.

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(9) Negligence is a relative term, depending upon the known value of the article, and the means of security possessed by the bailee; and both these circumstances are material to be considered, in estimating the want of care with reference to a particular article. A stage-coachman, therefore, who should deposit a parcel containing bank-notes and bills to a large amount, in the boot of his coach, instead of placing it under the seat in the inside, or other place used for valuable articles, not having any knowledge of its contents, but entitled, from the effect of a general notice, to consider it as a parcel containing articles of ordinary value, would not, although there might be evidence, in other respects, of particular neglect, be guilty of gross negligence, so as to render him responsible for the loss, notwithstanding he was protected by a general notice. *Batson v. Donovan*, 4 Barn. and Ald. 21. See the observation of Bailey, J. in *Sleat v. Fagg*, 5 Barn. and Ald. 348. *Bodenham v. Bennet*, 4 Price, 31.

(1) Civ. Law, lib. 1. tit. 7. § 1.

“ delivered, without being responsible for the contents “ of it.” I confess, however, that, anxiously as I wish on all occasions to see authorities respected, and judgments holden sacred, BONION’s case appears to me wholly incomprehensible; for the defendant, instead of having been *grossly* negligent (which alone could have exposed him to an action,) seems to have used at least ordinary diligence; and, after all, the loss was occasioned by a *burglary*, for which no bailee can be responsible, without a very special undertaking. The plea, therefore, in this case, was good, and the replication idle; nor could I ever help suspecting a mistake in the last words, *alii quodd non*; although *Richard de Winchedon*, or whoever was the compiler of the *table* to this year-book, makes a distinction, that “ if jewels be bailed to me, “ and I put them into a casket, and thieves rob me of them “ in the night time, I am answerable; not, if they be delivered to me in a chest sealed up;” which could never have been law; for the next oldest case, in the book of *Assise*, contains the opinion of Chief Justice THORPE, that “ a general bailee to keep is not responsible, if the [ 40 ] “ goods be stolen, without his gross neglect;”(e) and it appears, indeed, from *Fitzherbert*, that the party was driven to this issue, “ whether the goods were taken away “ by robbers.”

Mosaic Laws. By the *Mosaic* institutions, “ if a man delivered to his “ neighbour MONEY or STUFF to keep, and it was stolen “ out of his house, and the thief could not be found, the “ master of the house was to be brought before the judge, “ and to be discharged, if he could swear that he had “ not put his hand unto his neighbour’s goods,”(f) or, as

(e) 29 Ass. 28. Bro. Abr. tit. Bailment, pl. 7.

(f) Exod. xxii. 7, 8.



the *Roman* author of the *LEX DEI* translates it, *Nihil se nequiter gessisse* : (g) but a distinction seems to have been made between a stealing by *day* and a stealing by “*night*; (h) and “if *CATTLE* were bailed and stolen, (by *day*, “I presume,) the person who had the care of them was “bound to make restitution to the owner;” (i) for which the reason seems to be, that when *cattle* are delivered *to be kept*, the bailee is rather a *mandatary* than a depositary, and is, consequently, obliged to use a degree of diligence *adequate to the charge* : now, sheep can hardly be stolen in the *day-time* without some neglect of the shepherd; and we find that when *JACOB*, who was for a long time at least, a bailee of a different sort, *as he had a reward*, lost any of the beasts intrusted to his care, *LABAN* made him answer for them, “whether stolen by “day or stolen by night.” (k)

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Notwithstanding the high antiquity, as well as the manifest good sense, of the rule, a contrary doctrine was advanced by Sir *EDWARD COKE* in his *Reports*, and afterwards deliberately inserted in his *Commentary on LITTLETON*, the great result of all his experience and learning; namely, “that a depositary is responsible, if the “goods be stolen from him, unless he accept them specially *to keep as his own*,” whence he advises all depositaries to make such a special acceptance. (l) This opinion, so repugnant to natural reason and the laws of all other nations, he grounded partly on some broker cases in the year-books, mere conversations on the bench, or loose arguments at the bar; and partly on *SOUTHCOTE’S* case, which he has reported, and which by no

(g) Lib. 10. De Deposito. This book is printed in the same volume with the Theodosian Code, Paris, 1586.

(h) Gen. xxxi. 39. (i) Exod. xxii. 72. (k) Gen. xxxi. 39.

(l) 4 Rep. 83. b. 1 Inst. 89. a. b.

means warrants his deduction from it. As I humbly conceive that case to be law, though the doctrine of the learned reporter cannot in all points be maintained,(2) I shall offer a few remarks on the pleadings in the cause, and the judgment given on them.

Southcote's  
case.

[ 42 ]

SOUTHCOTE declared in detinue, that he had delivered goods to BENNET, *to be by him SAFELY kept*: the defendant confessed SUCH delivery, but pleaded in bar, that a certain person STOLE them out of his possession; the plaintiff replied, protesting that he had not been robbed, that the person named in the plea was a SERVANT of the defendant, and demanded judgment; which, on a general demurrer to the replication, he obtained. The reason of the judgment, says Lord Coke, was, because the plaintiff had delivered the goods to be SAFELY kept, and the defendant had taken the charge of them upon himself, by accepting them on SUCH a delivery." Had the reporter stopped here, I do not see what possible objection could have been made; but his exuberant erudition boiled over, and produced the frothy conceit, which has occasioned so many reflections on the case itself; namely, "that to KEEP and to keep SAFELY are one and the same thing;" a notion,(3) which was denied to be law by the whole court in the time of Chief Justice Holt.(m)

(m) Ld. Raym. 911. margin.

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(2) See 2 Ld. Ray. 911. and note,(c) 912—914.

(3) In a case similar to the above, where the plaintiff declared in detinue, that he had delivered certain antiques to the defendant to be by him safely kept, the defendant pleaded that the articles were delivered to him to take care of as his own, and to be shown to persons to ascertain their value, and that the defendant having them in his pocket for

It is far from my intent to speak in derogation of the great commentator on *Littleton*; since it may truly be asserted of him, as *Quintilian* said of *CICERO*, that an admiration of his works is a sure mark of some proficiency in the study of the law;(4) but it must be allowed, that his profuse learning often ran wild, and that he has injured many a good case by the vanity of thinking to improve them.

The pleader, who drew the replication in *Southcote's* [ 43 ] case, must have entertained an idea, that the blame was greater, if a servant of the depositary stole the goods, than if a mere stranger had purloined them; since the defendant ought to have been more on his guard against a person who had so many opportunities of stealing; and it was his own fault, if he gave those opportunities to a man, of whose honesty he was not more certain: the court, we find, rejected this distinction, and also held the replication informal; but agreed, that no advantage could be taken on a general demurrer of such informality, and gave judgment on the substantial badness of the

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that purpose, they were stolen from him, without his default, by some person unknown. Upon demurrer to the plaintiff's replication, which put in issue the terms of the delivery, the court recognized the above distinction between "to keep and to keep safely," and gave judgment for the plaintiff. *Willis, C. J.*, in delivering the judgment of the court, observed, that, according to *Southcote's* case, and the case of *Coggs v. Bernard*, and several other cases, if the goods were delivered to be kept safely, though the defendant had been robbed of them, detinue will lie against him; for he must take his remedy against the thief, or the hundred, as he can. But if the goods were delivered to the defendant to take care of them as his own proper goods, if he be robbed of them, this is a good plea. *Kettle v. Bromsall. Willes's Rep. 121.*

(4) "Ille se profecisse sciat, cui Cicero valde placebit." *Inst. Orat. lib. 10. c. 1. § 6.*

# THE LAW OF BAILMENTS.

plea.<sup>(n)</sup> If the plaintiff, instead of replying, had demurred to the plea in bar, he might have insisted in argument, with reason and law on his side, "that, although a general bailee to keep be responsible for GROSS neglect only, yet *Bennet* had, by a special acceptance, made himself answerable for ORDINARY neglect at least; that it was ordinary neglect to let the goods be stolen out of his possession, and he had not averred that they were stolen without his default; that he ought to have put them into a safe place, according to his undertaking, and have kept the key of it himself; that the special bailee was reduced to the class of a *conductor operis*, or a workman for hire; and that a tailor, to whom his employer has delivered lace for a suit of clothes, is bound, if the lace be stolen, to restore the value of it."<sup>(o)</sup> This reasoning would not have been just, if the bailee had pleaded, as in *Bonion's* case, that he had been robbed by violence, for no degree of care can, in general, prevent an open robbery: *impetus prædonum*, says *ULPIAN*, à nullo præstantur.

Mr. Justice *POWELL*, speaking of *Southcote's* case, which he denies to be law, admits, that "if a man does undertake specially to keep goods SAFELY, that is a warranty, and will oblige the bailee to keep them safe-

(n) 1 Cro. 815.

(o) "Alia est furti ratio: id enim non casui, sed levi culpæ, ferre ascribitur." Gothofr. Comm. in L. Contractus, p. 145. See D. 17. 2. 52. 3., "where," says the annotator, "Adversus latrones parum prodest custodia: adversus furem predesse potest si quis advigilet." See also Poth. Contrat de Louage, n. 429. and Contrat de Pret à usage, n. 53. So, by Justice *Cottesmore*, "Si jeo grante byens a un home a garder a mon oeps, si les byens per son mesgarde sont embles, il sera charge a moy de mesmes les byens, mez s'il soit robbe de mesmes les byens, il est excusable per le ley." 10 Hen. VI. 21. (5.)

(5) Vide *Finucane v. Small*, 1 Esp. N. P. C. 315. post.

“ly against perils, where *he has a remedy over*, but not “against those where *he has no remedy over*.” (p) One is unwilling to suppose, that this learned judge had not read Lord Coke’s report with attention; yet the case which he puts is precisely that which he opposes, for Bennet *did* undertake “to keep the goods SAFELY;” and, with submission, *the degree of care demanded*, not the *remedy over*, is the true measure of the obligation; for the bailee might have his *appeal of robbery*, yet he is not bound to keep the goods against robbers, without a most express agreement. (q) This, I apprehend, is all that was meant by St. GERMAN, when he says, “that, if a man *have nothing* for keeping the goods bailed, and promise, at “the time of the delivery, to restore them *safe at his peril*, he is not responsible for *mere casualties* ;” (r) but the “rule extracted from this passage, that a *special acceptance to keep SAFELY* will not charge the bailee against “the acts of *wrong-doers*,” (s) to which purport HOBART also and CROKE are cited, is too general, and must be confined to acts of *violence*.

[ 45 ]

I cannot leave this point without remarking, that a *tenant at will*, whose interest, when he has it rent-free, the *Romans* called *PRECARIUM*, stands in a situation exactly parallel to that of a depositary; for, although the contract be for *his benefit*, and, in some instances, for his benefit *only*, yet he has an *interest* in the land till the will is determined, “and, our law adds, it is the folly of the “lessor, if he do not restrain him by a special condition:” thence it was adjudged, in the *Countess of Shrewsbury’s* case, “that an action will not lie against a tenant at will “generally, if the house be burned through his neglect; (t)

(p) Ld. Raym. 9. 12.

(q) 2 Sho. pl. 166.

(r) Doct. and Stud. dial. 2. chap. 38.

(s) Com. 135. Ld. Raym. 915.

(t) 5 Rep. 13. b.

"but, says Justice *Powell*, "had the action been found  
 "ed on a *special* undertaking,(6) as that, in considera-  
 "tion that the lessor would let him live in the house, he  
 "would deliver it up *in as good repair as it then was in*,  
 "such an action would have been maintainable."(u)

Rules and ex-  
 ceptions.

It being then established, that a bailee of the *first* sort is answerable only for a *fraud*, or for *gross* neglect, which is considered as evidence of it,(d) and not for such *ordinary* inattentions as may be compatible with *good faith*, if the depositary be himself a *careless and inattentive* man; a question may arise, whether, if proof be given, that he is, in truth, very *thoughtful and vigilant in his own concerns*, he is not bound to restitution, if the deposit be lost through his neglect, either *ordinary* or *slight*; and it seems easy to support the affirmative; since in this case the measure of diligence is *that which the bailee uses in his own affairs*. It must, however, be confessed, that the character of the individual depositary can hardly be an object of judicial discussion: if he be *slightly*, or even *ordinarily* negligent in keeping the goods deposited, the favourable presumption is, that he is equally neglectful of his own property; but this presumption, like all others, may be repelled; and, if it be proved, for instance, that, his house being on fire, he saved his own goods, and, having time and power to save also those deposited, suf-

[ 47 ]

(u) *Ld. Raym.* 911.

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(6) See *Noy's Maxims*, 85. *Bythewood's Ed.* 201. *Earl of Chesterfield v. Duke of Bolton*, *Com. Rep.* 627. *Bullock v. Domitt*, 6 T. R. 650. 1 *Wm's Saund.* 323. n. 7. 2 *Id.* 422. n. 2.

[(d) If this gross negligence which is evidence of fraud, can be rebutted by evidence that the depositary keeps his own goods of the same kind in a manner equally negligent, then he is not liable. 4 *Bur. Rep.* 2300. *Stra.* 1099. *Ld. Raym.* 655.; and see *Stanton v. Bell*, 2 *Hawks, North Car. Rep.* 145.

ferred them to be burned, he shall restore the worth of them to the owner.(w) If, indeed, he have time to save only one of two chests, and one be a deposit, the other his own property, he may justly prefer his own; unless that contain things of small comparative value, and the other be full of much more precious goods, as fine linen or silks; in which case he ought to save the more valuable chest, and has a right to claim indemnification from the depositor for the loss of his own. Still farther; if he commit even a *gross* neglect in regard to his own goods *as well as* those bailed, by which *both* are lost or damaged, *he cannot be said to have violated good faith*, and the bailor must impute to his own folly the confidence which he reposed in so improvident and thoughtless a person.(x)

To this principle, that a depositary is answerable *only* for *gross* negligence, there are some exceptions.

First, as in *Southcote's* case, where the bailee, by a *special* agreement, has engaged to answer for less:(E)

(w) Poth. Contrat de Dépôt, n. 29. Stiernh. de Jure Sueon. 1. 2. c. 5.

(x) Bract. 99. b. Justin. Inst. 1. 8. tit. 15.

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[(E) Yet a special agreement does not subject him at all events. Thus, if the thing bailed is destroyed by inevitable accident, as lightning or tempest, the depositary is not liable. But this rule presupposes that the depositary has himself been in no fault, for he may by his own default subject the goods to inevitable accident. Lord Ray. 910. Hobart Rep. 34. Doct. and Stud. 130. Thus, if a man lend another a horse, and a house by chance falls on the horse, if it appears that the house was likely to fall when the horse was placed near it, then it cannot be taken as a chance, but as the default of him that had the horse delivered to him; but if the house were strong, and of likelihood, or common presumption, in no danger of falling, but fell by a sudden tempest, or other casualty, then it shall be taken as a chance, and he that had the keeping of the horse shall be discharged. Doct. and Stud. 222. 1 Bac. Ab. 377. A mere agreement to undertake a trust *in futuro*, without

"Si quid nomination convenit," says the *Roman* lawyer, "vel plus vel minus in singulis contractibus, hoc servabitur quod initio convenit; legem enim contractui dedit;" (y) (7) but the opinion of CELSUS, that an agreement to dispense with deceit is void, as being contrary to good morals and decency, has the assent both of *Ulpian* and our *English* courts. (z)

Secondly, when a man spontaneously and officiously proposes to keep the goods of another, he may prevent the owner from intrusting them with a person of more approved vigilance: for which reason he takes upon himself, according to JULIAN, the risk of the deposit, and becomes responsible at least for ordinary neglect, but not for mere casualties. (a)

Where things are deposited through necessity on any sudden emergence, as a fire or a shipwreck, M. LE BRUN insists, "that the depositary must answer for less than gross neglect, how careless soever he may be in his own affairs; since the preceding remark, that a man who reposes confidence in an improvident person,

(y) 1 Contractus, 23. D. de reg. jur.

(z) Doct and Stud. dial. 2. chap. 38.

(a) D. 16. 3. 1. 35.

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(7) It is a maxim of the English law, that, *modus et conventio vincunt legem*, prevails in this, as well as every other species of contract, when not contrary to sound morals, or any established principle of the law. Vide Viner's Abrid. Index, title Maxim. Noy's Maxims, 16. Bythewood's Ed. 57.

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compensation, is not obligatory; but when once undertaken, and the trust actually entered upon, the bailee is bound to perform it, according to the terms of the agreement. The confidence placed in him, and his undertaking to execute the trust, raise a sufficient consideration. *Rutgers v. Lucet*, 2 Johns, Cas. 92. 95. and See 1 Bac. Ab. 375. 12 Mod. 487. Reeve's E. L. 245. 6 Ld. Ray. 909—19.]



"must impute any loss to his own folly, is inapplicable to a case where the deposit was not optional; and the law ceases with the reason of it;" (b) but that is not the only reason; and, though it is an additional misfortune, for a man in extreme haste and deep distress to light upon a stupid or inattentive depositary, yet I can hardly persuade myself, that more than perfect *good faith* is demanded in this case, although a violation of that faith be certainly more criminal than in other cases, and was therefore punished at *Rome* by a forfeiture of the double value of the goods deposited. (8)

[ 49 ]

(b) De la Prestation des Fautes, p. 77.

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(8) By the Code Napoleon, Art. 1920, a deposit is either voluntary, or necessary; voluntary, when made with the consent of both parties; necessary, when induced by the pressure of unexpected calamity, as fire or shipwreck; but by Art. 1923, they are both governed by the same general principles. By the same law, Art. 1923, a voluntary deposit must be established by written proof, when it exceeds in value 150 francs, (about 6*l.* 5*s.* when the exchange is at par) or otherwise, the bailor must rely exclusively upon the declarations of the depositary, as to the fact of the deposit, the subject matter of it, or the terms upon which it was to be restored.

The Roman law, and the laws of the greater part of the states of Europe, which bear a great conformity to the civil law, require written proof in a great variety of cases; but the common law of England rarely requires the transaction to be in writing, even in the conveyance of real property, to which it paid so much regard. That form, however, was requisite in the case of incorporeal hereditaments which could pass only by grant, 1 Inst. 9. a. 2 Woodeson's Lect. 62., for not being of a substantial nature, and, like real property, capable of an actual delivery, that form was required as evidence of the transfer. By statute, however, writing is made essential in many cases, particularly by the Stat. of Frauds, 29 Car. II. c. 3. But the operation of that statute, as far as it relates to contracts for the sale of goods, has been considerably diminished by a *Nisi Prius* decision of *Towers v. Osborn*, 1 Str. 506, followed in several subsequent cases, *Clayton v. Andrews*. 4 Burr. 2101. *Groves v. Buck*, 3 M. and S. 178. by which a large class of contracts

In these circumstances, however, a benevolent offer of keeping another's property for a time would not, I think, bring the case within *Julian's* rule before mentioned, so as to make the person offering answerable for *slight*, or even *ordinary* negligence; and my opinion is confirmed by the authority of LABEO, who requires no more than good faith of a *negotiarum gestor*, when "affectione coactus, ne bona mea distrahantur, negotiis se meis obtulerit."

Thirdly; when the bailee, improperly called a *depository*, either *directly* demands and receives a reward for his care, or takes the charge of goods in consequence of some *lucrative* contract, he becomes answerable for *ordinary* neglect; since, in truth, he is in both cases a *conductor operis*, and lets out his mental labour at a just price; thus, when clothes are left with a man, who is paid for the use of his bath, or a trunk with an inn-keeper or his

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has been excluded from the influence of the statute. The reason upon which that, and the decisions grounded upon it, proceeded, the incapability of complying with one of the three modes prescribed by the statute, the delivery of the goods, does not appear satisfactory, since one of the other two modes might be adopted, and the declared object of the statute entitles it to a liberal interpretation. Indeed, the present Lord Chief Justice of the court of King's Bench has expressed an opinion, that the case of *Towers v. Osborn* proceeded to the limit of the law; and, perhaps, the recent case of *Garbutt v. Watson*, 1 Dowl. and Ryl. 219. may be considered as undermining, in some degree, the principle of that decision. That it ever should have received the sanction of the court cannot fail to be a subject of regret; and, perhaps, the disposition lately evinced by the courts in the cases of *Sandler v. Wakefield*, 4 Barn. and Ald. 595. and *Jenkyn v. Reynolds*, 3 Brp. and B. 14. *Garbutt v. Watson*, 1 Dowl. and Ryl. 219., to give the statute a liberal interpretation, may justify the expectation, that this great security against fraud, and check to litigation, will in this respect be one day restored, and the case of *Towers v. Osborn*, at no very distant period, be considered not to be law

servants, or with a ferryman, the bailees are as much bound to indemnify the owners, if the goods be lost or damaged through their want of *ordinary* circumspection, as if they were to receive a stipulated recompense for *their attention and pains* ; but of this more fully, when we come to the article of *hiring*. [ 50 ]

Fourthly ; when the *bailee alone* receives advantage from the deposit, as, if a thing be borrowed on a future event, and deposited with the intended borrower, until the event happens, because the owner, perhaps, is likely to be absent at the time, such a depositary must answer even for *slight* negligence ; and this bailment, indeed, is rather a *loan* than a deposit, in whatever light it may be considered by the parties. Suppose, for example, that *Charles*, intending to appear at a masked ball expected to be given on a future night, requests *George* to lend him a dress and jewels for that purpose, and that *George*, being obliged to go immediately into the country, desires *Charles* to keep the dress till his return, and, if the ball be given in the mean time, to wear it ; this seems to be a regular *loan*, although the original purpose of borrowing be future and contingent.

Since, therefore, the two last cases are not, in strict propriety, *deposits*, the exceptions to the general rule are reduced to two only ; and the second of them, I conceive, will not be rejected by the *English* lawyer, although I recollect no decision or dictum exactly conformable to the opinion of *Julian*.

Clearly as the obligation to *restore* a deposit flows from the nature and definition of this contract, yet, in the reign of ELIZABETH, when it had been adjudged, consistently with common sense and common honesty, [ 51 ]  
 “ that an action on the case lay against a man, who had  
 “ not performed his promise of re-delivering, or deliver-

"ing over, things bailed to him," that judgment was reversed; and, in the sixth year of JAMES, judgment for the plaintiff was arrested in a case exactly similar: (c) it is no wonder that the profession *grumbled*, as Lord HOLT says, at so absurd a reversal; which was itself most justly reversed a few years after, and the first decision solemnly established. (d)(F).

(c.) Velv. 4. 50. 128.

(d) 2 Cro. 667. Wheatley and Low.

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[(F) If the depositary detain the goods after demand by the bailor, or otherwise converts them to his own use, the bailor may maintain trover, detinue, or assumpsit. He may maintain trover, on the ground of the conversion; detinue, because the goods are unlawfully detained; and assumpsit, on the contract. In some cases, also, a special action on the case, and in others, an action of trespass, will lie. Thus, if A. borrows a horse to go to Dover, and goes to other places, the owner may have an action on the case against him for exceeding the purposes of the loan; for so far it is a secret and fallacious abuse of his property; but a general action of trespass would not lie in this case, but it is not an open and violent invasion of it. Roll. Rep. 128. Bac. Abr. 374. But if a man lend to another sheep to stock his land, and the bailee kill them, the owner shall have a general action of trespass, or an action of trover, at his election; for though the use is in the borrower, yet the property is in the lender, and the killing of the sheep is in open violation of another's property, which is complained of in the general action of trespass. Co. Lit. 57. Cro. Eliz. 784. Moore, 248. Owen, 52. Dyer, 121. pl. 17. 1 Bac. Abr. 374. No action will lie against a mere naked bailee, to recover goods in his possession, until after a demand and refusal. *Brown and Hotchkiss v Cook*, 9 Johns. Rep. 361. If goods are bailed by B. to C., C. must deliver them to B., for C. cannot pretend to remove or alter that possession committed to him in order to restore it to the right owner, for the right of restitution must be demanded of him that did the injury, of which C. has no pretence to urge, and therefore it would be downright treachery in him to deliver them to any other than him from whom he had them. Roll. Abr. 607. 1 Bac. Ab. 369. This is in accordance with the provisions of the Code Napoleon on this subject, article 1937, "Le depositaire ne doit

Among the curious remains of *Attic* law, which philologists have collected, very little relates to the contracts which are the subject of this Essay; but I remember to have read of DEMOSTHENES, that he was advocate for a person, with whom *three* men had deposited some valuable utensil, of which they were joint owners; and the depositary had delivered it to *one* of them, of whose knavery he had no suspicion; upon which the other *two* brought an action, but were nonsuited on their own evidence, that there was a *third* bailor, whom they had not joined in the suit; for, the truth not being proved, *Demosthenes* insisted, that his client could not legally restore the deposit, unless all three proprietors were ready, to receive it; and this doctrine was good at *Rome* as well as at *Athens*, when the thing deposited was in its nature incapable of partition; it is also law, I apprehend, in *Westminster Hall*.(e)(9)

Grecian and  
Arabian laws.

[ 52 ]

(e) D. 16. 3. 1. 36. Bro. Abr. tit. Bailment, pl. 4.

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(9) Property belonging to several joint owners, who concurrently deposit it with a bailee by whom it is accepted on their joint account,

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vestituer la chose déposée, qu'à celui qui la lui a confiée, ou a celui au nom duquel le dépôt a été fait, ou a celui qui a été indiqué pour le recevoir. Article 1938. Il ne peut pas exiger de celui qui a fait le dépôt." But if A. bails goods to B. to which C. has a right, and B. dies, his executors are chargeable only to C. that has right, for the executors came to the possession by the law, and therefore must deliver it to those persons in whom the law has established the property; and the taking up of an executorship is an engagement to answer all debts of the deceased, and all undertakings that create a debt, so far as there are assets, but doth not embark the executor in the personal trusts of the deceased, any more than he is obliged to answer for his several injuries. Rol. Ab. 607. 1 Bac. Ab. 369.

The obligation to return a deposit faithfully was, in very early times, holden sacred by the *Greeks*, as we learn from the story of GLAUCUS, (1) who, on consulting the oracle, received his answer, "that it was criminal even to harbour a thought of withholding deposited goods from the owners, who claimed them;" (f) and a fine application of this *universal* law is made by an *Arabian* poet contemporary with JUSTINIAN, who remarks, "that life and wealth are only *deposited* with us by our Creator, and, like all other deposits, must in due time be restored." (g.)

Law of mandates.

II. Employment by COMMISSION was also known to our ancient lawyers; and BRACTON, the best writer of them all, expresses it by the *Roman* word *mandatum*; now, as the very essence of this contract is the *gratuitous* performance of it by the bailee, and as the term *commission* is also pretty generally applied to bailees, who receive *hire* or *compensation* for their attention and trouble, I shall not scruple to adopt the word MANDATE as

(f) Herod. VI. 86. Juv. Sat. XIII. 199.

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cannot be legally demanded without the consent of all parties. If, however, the bailee is not privy to such arrangement, but accepts the property from one of them, by whom as well as by the bailee, it is treated as belonging to him exclusively, the bailee cannot set up the want of consent of the other party, not privy to the deposit, to prevent his re-delivery of the property to him who bailed it, or to his legal representatives. May and another, assignees of Taylor, v. Harvey, 13 East, 197.

(1) Vide Seneca de Benef. 4. 10. Cic. de Off. lib. 1. Eden's Elements Juris Civilis, 175.

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[ (g.) When a bailee may be guilty of Larceny, See 1 Hawk. P. C. 144. b. 1 c. 19. s. 8, 9, 10. The State v. Long, 1 Haywood Rép. 155.]

appropriated in a *limited sense* to the species of bailment now before us; nor will any confusion arise from the common acceptation of the word in the sense of a judicial command or precept, which is, in truth, only a *secondary* and inaccurate usage of it. The great distinction then between one sort of *mandate* and a *deposit* is, that the former *lies in fessance*, and the latter, simply *in custody*: whence, as we have already intimated, a difference often arises between the degrees of care demanded in the one contract and in the other; for, the mandatary being considered as having engaged himself to use a *degree of diligence and attention adequate to the performance of his undertaking*, the omission of such diligence may be, according to the nature of the business, either *ordinary*, or *slight*, neglect; although a bailee of this species ought regularly to be answerable only for a violation of *good faith*.(2) This is the common doctrine taken from the

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(2) A person, who undertakes, without a reward, to perform a particular service, where his situation is not such as to imply skill, or knowledge, in the particular transaction, will not be responsible for a loss, when he has acted *bona fide*, and exercised the same care which he takes in his own affairs.

The defendant, who was a general merchant in London, having received orders from his correspondent in Madeira, to send thither a quantity of leather cut out for shoes and boots, employed Goodwin the bankrupt, who was a shoemaker, to execute the order. Goodwin accordingly prepared the leather for the defendant, packed it in a case for exportation, and at the same time prepared another parcel of the same kind of leather, on his own account, which he packed in a separate case, to be sent to Madeira on a venture, requesting the recommendation of the defendant to his correspondents in the sale of it. The two cases were sent to the defendant's house, with bills of parcels, and he, in order to save the trouble of a separate entry at the custom-house, voluntarily, and without any compensation, by agreement with Good-

law of ULPIAN; but there seems, in reality, to be no exception in the present case from the general rule; for,

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win, made one entry of both the cases, but did it under the denomination of wrought leather, instead of dressed leather, which it ought to have been. In consequence of this mistake in the entry, the two cases were seized, and this action was brought by the assignees of Goodwin, to recover the value of the leather, which he had prepared to export on his own account. The court held that the defendant was not liable for the loss, since he had acted *bona fide*, and taken the same care of the goods as of his own, and, not being of a profession which implied knowledge in the particular transaction, the wrong entry could not in him be considered as gross negligence. Lord Loughborough, C. J. observed, "I agree with Sir W. Jones, that where a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, there the bailee is only liable for gross negligence; but if a man gratuitously undertakes to do any thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence. If in this case a ship-broker, or a clerk in the custom-house, had undertaken to enter the goods, a wrong entry would in them be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries; but when an application, under the circumstances of this case, is made to a general merchant to make an entry at the custom-house, such a mistake as this is not to be imputed to him as gross negligence." *Shiells and Thorne, assignees of Goodwin, v. Blackburne*, 1 Hen. Bl. 158. See *Nelson v. McIntosh*, 1 Stark. 238.

So, a gratuitous bailee, who turns a horse after dark into a dangerous pasture to which it was unaccustomed, in consequence of which it meets with its death, is guilty of that degree of negligence which will render him responsible to the bailor. In an action for not repairing the fences of a close adjoining that of the plaintiff, in consequence of which the plaintiff's horse fell into the defendant's close, and was killed, it appeared that the horse was the property of the plaintiff's brother, who sent it to him the night before the accident; that the plaintiff put it into his stable for a short time, and then turned it after dark into his close where his own cattle usually grazed, and that on the following morning the horse was found dead in the close of the defendant, having fallen from the one to the other. Lord Ellenborough, C. J. observed,



since *good faith* itself obliges every man to perform his actual engagements, it of course obliges the mandatory to exert himself in proportion to the exigence of the affair in hand, and neither to *do* any thing, how minute soever, by which his employer may sustain damage, nor omit any thing, however inconsiderable, which the nature of the act requires : (g) nor will a want of ability to perform the contract be any defence for the contracting party ; for, though the law *exact*s no impossible things, yet it may justly require that every man should know his own strength before he undertakes to do an act, and that, if he delude another by false pretensions to skill, he shall be responsible for any injury that may be occasioned by such delusion. If, indeed, an unskilful man yield to the pressing instances of his friend, who could not otherwise have his work performed, and engage reluctantly in the

(g) Lord Raym. 910.

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that the plaintiff, although he was a gratuitous bailee, owed it to the bailor, not to put the horse into a dangerous pasture. Perhaps the horse might have been safe during the day-light, but that the turning it into a pasture to which it was un-used, after dark, was a degree of negligence sufficient to render him liable, and that consequently the plaintiff might maintain an action in his own name. *Booth v. Wilson*, 1 Barn. and Ald. 59.(u)

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[(n) Where the bailee undertakes to perform a gratuitous act, from which the bailor alone receives benefit, there the bailee is liable only for gross neglect. *Secus*, where the profession of the bailee implies skill, for then want of skill is imputable as gross neglect. *Stanton v. Bell*, 2 Hawks. North Car. Rep. 145.

A person or corporation allowing his or its servants, or clerks, to receive for custody the goods of another, especially in relation to special deposits, will be considered the bailee of the goods so received, and will incur all the duties and liabilities belonging to that relation. *Foster v. Essex Bank*, 17 Mass. Rep. 479.]

business, no higher degree of diligence can be demanded of him than a fair exertion of his capacity.

[ 54 ] It is almost needless to add, that a mandatary, as well as a depositary, may bind himself by a *special* agreement to be answerable even for casualties ;(3) but that neither the one nor the other can exempt himself by any stipulation from responsibility for *fraud*, or, its equivalent, *gross neglect*.

Distinction  
between *mis-  
feasance* and  
*nonfeasance*.

A distinction seems very early to have been made in our law between the *nonfeasance*, and the *misfeasance*,(4

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(3) The parties to a bailment may not only vary the terms according to their pleasure, but a bailee may impose upon himself an additional degree of care on account of his interfering with the property committed to his charge, by which its custody is rendered more insecure. As when a captain of a vessel, who had, without a reward, taken charge of a box containing doubloons, dollars, and other valuable articles, belonging to a person who was to have worked his passage home, but was accidentally left behind, during the course of the voyage, opened the box for the purpose of ascertaining whether it contained contraband goods, and upon the arrival of the ship towards the end of the voyage he again opened it in the presence of several passengers, and taking out the contents, which he put into a canvass bag, deposited them in his chest in the cabin, in which his own valuables were usually kept. When the vessel arrived at Gravesend, a river pilot was taken on board, and the captain and one mate left the vessel, another mate remaining on board; an excise officer was also on board, and two young men belonging to the vessel were allowed to sleep in the cabin. On the next morning the bag containing the valuables was missing, and was not afterwards discovered. In an action to recover the value of the property, the captain was holden to have imposed upon himself the duty of carefully guarding against all perils to which the property was exposed, by means of the alteration, and having failed to take such care, in consequence of which the loss happened, he was responsible for the loss, although as a bailee without hire he was only bound to take prudent care of them. *Nelson v. Macintosh*, 1 Stark. N. P. C. 237.

(4) This distinction is well established. An action for a *mere nonfeasance* cannot be maintained, even when accompanied with special damage; as if a carpenter undertakes to build a house, within a given

of a *conductor operis*, and, by equal reason, of a mandatary; or, in other words, between a total failure of per-

time, and refuse to proceed, in consequence of which an injury is sustained, no action will lie, 11 Hen. IV. 33. A. 21. Hen. VI. 55. b. 1 Roll. Abr. 9. pl. 1, 2. 2 Ld. Raym. 1919, 1920. *Elsev v. Gatward*, 5 T. R. 143. except in certain cases where, from their situation, some persons are bound to do what is requested of them in the course of their employment, and are entitled to a recompense. As in the case of a carrier, *vide post*, 103 n.; or an inn-keeper, *vide post*, 95 n.; or where a farrier, having materials for the purpose, refuses to shoe the horse of a traveler, (21 Hen. VI. c. 55, 56. 1 Salk. 18. 1 Ld. Raym. 654. 12 Mod. 484.) or a ferryman to convey one over a common ferry, and the like; *Churchman v. Tunstal, Hardress*, 163. 5. T. R. 149, 150. 1 Wm's Saund. 312. n. 2. This doctrine was established and illustrated in a late case, in which the first count of the declaration stated, that the plaintiff had retained the defendant, who was a builder, to build and repair certain premises within a given day, and that the defendant accepted the retainer, but did not perform the work within the given time, in consequence of which the walls of the plaintiff's house were injured, and the plaintiff in other respects was damaged and put to expense. And the second count, that the plaintiff being in possession of some old materials retained the defendant to perform the carpenter's work on certain buildings of the plaintiff, and to use the old materials, but that the defendant, instead of using them, made use of new ones, thereby increasing the expense. And upon a general demurrer to the whole declaration, the court gave judgment for the defendant, upon the ground that the first count was not good in law, since no consideration was stated, or that the defendant had entered upon the work. The second count, however, was considered to be valid, for the defendant's misfeasance in not performing the work which he had entered upon, according to his retainer, by which the plaintiff was subject to considerable expense, was a good cause of action.

Lord Kenyon, C. J. observed, "that no consideration results from "the defendant's situation as a carpenter, nor is he bound to perform "all the work that is tendered to him." And Mr. Justice Ashhurst, in giving his opinion on the same case, remarked the following distinction: "If a party undertake to perform work, and proceed on the employment, he makes himself liable for any misfeasance in the course of "that work. But if he undertake, and do not proceed on the work, no

[ 55 ]

forming an executory undertaking, and a culpable neglect in executing it; for, when an action on the case was brought against a carpenter, who, having undertaken to build a new house for the plaintiff within a certain time, *had not built it*, the court gave judgment of nonsuit; but agreed, that, if the defendant had built the house negligently and spoiled the timber, an action against him would have been maintainable.<sup>(h)</sup> However, in a subsequent reign, when a similar action was commenced against one WATKINS for *not building* a mill according to his undertaking, there was a long conversation between the judges and the bar, which Chief Justice *Babington* at length interrupted by ordering the defendant's counsel either to plead or to demur: but Serjeant *Rolf* chose to plead specially, and issue was taken on a *discharge* of the agreement.<sup>(i)</sup> Justice *Martin* objected to the action, because no tort was allèged; and he persisted warmly in his opinion, which seems not wholly irreconcilable to that of his two brethren; for in the cases which they put, a special injury *was* supposed to be occasioned by the non-performance of the contract.

Authority and reason both convince me, that *Martin*,

(h) Year B. 11 Hen. IV. 33.(5)

(i) Year B. 3 Hen. VI. 36. b. 37. a. Stath. Abr. tit. Accions sur le cas, pl. 20.

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“ action will lie against him for the misfeasance. In this case, the defendant's undertaking was merely voluntary, no consideration for it being stated. There was no custom of the realm, or any legal obligation to compel him to perform the work, and that distinguishes this case from those of a common carrier, porter, and ferryman, who are bound by their situations in life to perform the work tendered to them; but a carpenter, as such, is not bound by any such obligation.” *Elisee v. Gatward*, 5 T. R. 143.

(5) See 5 Term Rep. 150.

into whose opinion the reporter recommends an inquiry, was wrong in his objection, if he meant, as Justice *Cockain* and the Chief Justice seem to have understood him, that no such action would lie for *nonfeasance*, even though special damage had been stated. His argument was, that the action before them sounded in covenant merely, and required a specialty to support it; but that, if the covenant had been changed into a *tort*, a good writ of trespass on the case might have been maintained: he gave, indeed, an example of *misfeasance*, but did not controvert the instances which were given by the other judges.

[ 56 ]

It was not alleged, in either of the cases just cited, that the defendant was to receive *pay* for the *feasance* of his work; but, since both defendants were described as *actually in trade*, it was not, perhaps, intended that they were to work for *nothing*: I cannot, however, persuade myself, that there would have been any difference, had the promises been purely *gratuitous*, and had the special injury been caused by the breach of them. Suppose, for instance, that *Robert's* corn-fields are surrounded by a ditch or trench, in which the water from a certain spring used to have a free course, but which has of late been obstructed by soil and rubbish; and that *Robert* informing his neighbour *Henry* of his intention speedily to clear the ditch, *Henry* offers and undertakes immediately to remove the obstruction and repair the banks *without reward*, he having business of the same kind to perform on his own grounds: if, in this case, *Henry* neglect to do the work undertaken, "and the water, not having its "natural course, overflow the fields of *Robert* and spoil "his corn," may not *Robert* maintain his action on the case? Most assuredly; and so in a thousand instances of proper bailments that might be supposed, where a just

reliance on the promise of the defendant prevented the plaintiff from employing another person, and was consequently the cause of the loss which he sustained ;(k) for it is, as it ought to be, a general rule, that, for every *damnum injuriæ datum*, an action of some sort, which it is the province of the pleader to advise, may be maintained ; and although the *gratuitous* performance of an act be a *benefit* conferred, yet, according to the just maxim of PAULUS, *Adjuvari nos, non decipi, beneficio oportet* :(l) but the *special* damage, not the assumption, is the cause of this action ;(1) and, if notice be given by the mandatary, *before any damage incurred, and while another person may be employed*, that he cannot perform the work, no process of law can enforce the performance of it.

A case in *Brook*, made complete from the Year-book, to which he refers, *seems* directly in point ; for, by Chief Justice FINEAUX, *it had been adjudged*, that, “ if a  
“ man assume to build a house for me by a certain day,  
“ and do not build it, and I suffer damage by his non-  
“ *feasance*, I shall have an action on the case, as well as  
“ if he had *done it amiss* :” but it is *possible*, that Fi-

(k) Year B. 19 Hen. VI. 49.

(l) D. 13. 6. 17. 3.

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[(1) The learned author cites no authority in support of the position, “ that the action is founded on the special damage, and not on the assumption,” and it does not appear to be correct on principle : for if the action is founded on the *tort*, and not on the contract, how is it possible that an express agreement by the mandatary, will extend his liability, which it certainly may do ? If his express promise, as a promise, cannot bind him, how can a promise extend the liability which the law would otherwise impose ? Lord Ray. 910—919. 3 East Rep. 62. 5 Term Rep. 140—9. *Else v. Gatwood*.]

*neque* might suppose a consideration, though none be mentioned.(m)

Actions on this contract are, indeed, very uncommon, for a reason not extremely flattering to human nature; because it is very uncommon to undertake any office of trouble *without compensation*: but, whether the case really happened, or the reward, which had actually been stipulated, was omitted in the declaration, the question, "whether a man was responsible for damage to certain goods, occasioned by his negligence in performing a "GRATUITOUS promise," came before the court in which Lord Holt presided, so lately as the second year of Queen ANNE, and a point which the first elements of the *Roman* law have so fully decided, that no court of judicature on the Continent would suffer it to be debated, was thought in ENGLAND to deserve, what it certainly received, *very great consideration*.(n)

[ 58 ]

The case was this: BERNARD had assumed *without* pay safely to remove several casks of brandy from one cellar, and lay them down *safely* in another, but managed them so negligently, that one of the casks was staved. After the general issue joined, and a verdict for the plaintiff COGGS, a motion was made in arrest of judgment, on the irrelevancy of the declaration, in which it was neither alleged, that the defendant was to have *any recompense for his pains*, nor that he was a *common porter*: but the court were unanimously of opinion, that the action lay; and, as it was thought a matter of great consequence, each of the judges delivered his opinion separately.

Case of Coggs and Bernard.

[ 59 ]

(m) Bro. Abr. tit. Action sur le Case, 72.(6)

(n) Ld. Raym. 909—920. 1 Salk. 26. Com. 133. Farr. 13. 131. 528.

(6) See 5 Term Rep. 143.

The Chief Justice, as it has before been intimated, (o) pronounced a clear, methodical, elaborate argument; in which he distinguished bailments into *six* sorts, and gave a history of the principal authorities concerning each of them. This argument is justly represented by my learned friend, the annotator *on the First Institute*, as "a most "masterly view of the whole subject of bailment;" (p) and, if my little work be considered merely as a commentary on it, the student may, perhaps, think, that my time and attention have not been unusefully bestowed.

[ 60 ] For the decision of the principal case, it would have been sufficient, I imagine, to insist, that the point was *not new*, but had already been determined; that the writ in the REGISTER, called, in the strange dialect of our forefathers, *De pipâ vini cariand* (q), was not similar, but identical; for, had the reward been the *essence* of the action, it must have been inserted in the writ, and nothing would have been left for the declaration but the stating of the day, the year, and other circumstances; of which *Rastell* exhibits a complete example in a writ and declaration for *negligently and improvidently planting a quickset hedge*, which the defendant had promised to raise; *without any consideration alleged*; and issue was, joined on a traverse of the negligence and improvidence (r.) How any answer could have been given to these authorities, I am at a loss even to conceive; but, although it is needless to prove the same thing twice, yet other authorities, equally unanswerable, were addu-

(o) P. 35.

(p) Hargr. Co. Litt. 89. b. n. 3. The profession must lament the necessary suspension of this valuable work.

(q) Reg. Orig. 110. a. see also 110. b. *De equo infirmo sanando*, and *De columbari reparando*.

(r) Rast. Entr. 13. b.



eed by the court, and supported with reasons no less cogent ; for *nothing*, said Mr. Justice *Powell* emphatically, *is law, that is not reason* ;(7) a maxim, in theory excellent, but in practice dangerous, as many rules, true in the abstract, are false in the concrete ; for, since the reason of *Titius* may, and frequently does, differ from the reason of *Septimius*, no man, who is not a lawyer, would ever know how to act, and no man who is a lawyer, would in many instances know what to advise, unless courts were bound by *authority*, as firmly as the pagan deities were supposed to be bound by the decrees of fate.

Now, the *reason* assigned by the learned judge for the cases in the *Register* and *Year-books*, which were the same with *Coggs* and *Bernard*, namely, " that the party's SPECIAL *assumpsit* and undertaking obliged him so to do the thing, that the bailor came to no damage by his neglect," seems to intimate that the omission of the words *salvo et securè* would have made a difference in this case, as in that of a *deposit* ; but I humbly contend, that those words are implied by the nature of a contract which lies in *feasance*, agreeably to the distinction with which I began this article. As judgment, indeed, was to be given on the record merely, it was unnecessary, and might have been improper, to have extended the proposition beyond the point then before the court ; but I cannot think that the narrowness of the proposition in this instance affects the general doctrine which I have presumed to lay down ; and, in the strong case of the shepherd, *who had a flock to keep, which he suffered through negligence to be drowned*, neither a reward nor a

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(7). 2 Ld. Raym. 911

*special* undertaking are stated (s) : that case, in the opinion of Justice *Townsend*, depended upon the distinction between a bargain *executed* and *executory* ; but I cannot doubt the relevancy of an action in the second case, as well as the first, *whenever actual damage is occasioned by the nonfeasance.*(t)(9)

[ 62 ] There seems little necessity, after this, to mention the case of *Powtuary* and *Walton*, the reason of which applies directly to the present subject ; and, though it may be objected that the defendant was stated as a *farrier*, and must be *presumed* to have acted in his trade, yet Chief Justice *Rolle* intimates no such presumption ; but says expressly, that “ an action on the case lies upon “ this matter, *without alleging any consideration* : for the *negligence* is the cause of action, and not the *assumpsit.*”(u)

A bailment without reward to *carry* from place to place, is very different from a mandate to *perform a work* : and, there being nothing to take it out of the general rule, I cannot conceive that the bailee is responsible for *less* than *gross* neglect, unless there be a *special* acceptance : for instance, if *Stephen* desire *Philip* to

(s) Year B. 2 Hen. VII. 11.

(t) Stath. Abr. tit. Acciones sur le cas, pl. 11. By Justice Paston, “ si un “ ferroux face covenant ove moy de ferre mon chival, jeo die qe sil ne fer- “ ra mon chival, uncore jeo averai accion sur mon cas, qar en son default “ peraventure mon chival est perie.”(8)

(u) 1 Ro. Abr. 10.

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(8) This case is distinguishable ; for a farrier, like a common carrier, or inkeeper, is bound by law to perform certain duties, for which he is entitled to a recompense ; but where no such obligation results from the particular situation of the party, a consideration must be alleged, in order to render him liable. *Elsee v. Gatward*, 5 T. R. 149. ante p. 54.

(9) Vide ante p. 54. n. 3.

carry a diamond ring from *Bristol* to a person in *London*, and he put it, *with bank notes of his own*, into a letter-case, out of which it is *stolen* at an inn, or seized by a robber on the road, *Philip* shall not be answerable for it; although a *very careful*, or perhaps a *commonly prudent*, man would have kept it in his purse at the inn, and have concealed it somewhere in the carriage; but, if he were to secrete *his own notes* with peculiar vigilance, and either leave the diamond in an open room, or wear it on his finger in the chaise, I think he would be bound, in case of a loss by stealth or robbery, to restore the value of it to *Stephen*: every thing, therefore, that has been expounded in the preceding article concerning *deposits*, may be applied exactly to *this sort* of bailment, which may be considered as a subdivision of the second species.

[ 63 ]

Since we have nothing in these cases analogous to the judgments of *infamy*, which were often pronounced at *Rome* and *Athens*, it is hardly necessary to add, what appears from the speech of *CICERO* for *S. Roscius*, of *Ameria*, that "the ancient *Romans* considered a mandatory as *infamous*, if he broke his engagement, not only "by actual *fraud*, but even by *more than ordinary negligence*(w)." .

As to *exceptions* from the rule concerning the degree of neglect, for which a mandatory is responsible, almost all that has been advanced before in the article of *deposits*, in regard to a special convention, a voluntary offer, and an interest accruing to both parties, or only to the bailee, may be applied to mandates: an undertaker of a

Exceptions to the rule.

(w) "In privatis rebus, si quis rem mandatam non modo malitiosius gessisset, sui questûs aut commodi causa, verum etiam negligentius, cum majores summum admisisse dedecus existimabant; itaque mandati constitutum est judicium, non minus turpe quam furti." Pro S. Rosc. p. 116. Glaag.

work for the benefit of an absent person, and *without his knowledge*, is the *negotiorum gestor* of the civilians, and the obligation resulting from his implied contract has been incidentally mentioned in a preceding page.

[ 64 ]  
Law of loans  
for use.

III. On the third species of bailment, which is one of the most usual and most convenient in civil society, little remains to be observed; because our own, and the Roman law, are on this head perfectly coincident. I call it, after the *French* lawyers, *loan for use*, to distinguish it from their *loan for consumption*, or the *MUTUUM* of the *Romans*; by which is understood *the lending of money, wine, corn, and other things, that may be valued by number, weight, or measure, and are to be restored only in equal value or quantity (x)*: this latter contract, which, according to St. GERMAN, is most properly called a *loan*, does not belong to the present subject; but it may be right to remark, that, *as the specific things are not to be returned, the absolute property of them is transferred to the borrower, who must bear the loss of them, if they be destroyed by wreck, pillage, fire, or other inevitable misfortune.*(1) Very different is the nature of the bailment in

(x) Doct. and Stud. dial. 2. chap. 38. Bract. 99. a. b. In Ld. Raym. 916. where this passage from Bracton is cited by the Chief Justice, *mutuum* is printed for *commodatum*; but what then can be made of the words *ad ipsam restituendam*? There is certainly some mistake in the passage, which must be very ancient, for the oldest MS. that I have seen, is conformable to Tottel's edition. I suspect the omission of a whole line after the word *precium*, where the manuscript has a full point: and possibly the sentence omitted may be thus supplied from Justinian, whom Bracton copied. "*At is, qui mutuum accepit, obligatus remanet,*" *si forte incendio, &c.* Inst. 3. 13. 2.

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(1) If money, corn, wine, or any other such thing which cannot be re-delivered, or occupied, be borrowed, and it perish, it is at the peril of the borrower. But if a horse, or cart, or such other things, as may

gestion; for a horse, a chariot, a book, a greyhound, or a fowling piece, which are lent for the use of the bailee, ought to be re-delivered *specifically*; and the owner must abide the loss, if they perish through any accident which *a very careful and vigilant man* could not have avoided. *Dele*  
 The negligence of the borrower, who alone receives benefit from the contract, is construed rigorously, and, although *slight*, makes him liable to indemnify the lender; nor will his incapacity to exert *more than ordinary* attention, avail him on the ground of an *impossibility*, "which the law," says the rule, never "demands;" for that maxim relates merely to things *absolutely* impossible; and it was not only very *possible*, but very *expedient*, for him to have examined his own capacity of performing the undertaking, before he deluded his neighbour by engaging in it: if the lender, indeed, was not deceived, but perfectly knew the *quality*, as well as age, of the borrower, he must be supposed to have demanded no higher care than that of which *such* a person was capable; as, if *Paul* lend a fine horse to a raw youth,

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be used and delivered again, be used according to the purpose for which they were lent, if they perish, he who owns them shall bear the loss, if they perish not through default of him who borrowed them, or he made a promise at the time of delivery to re-deliver them safe again. If they be used in any other manner than according to the lending, in whatever manner they may perish, if it be not by default of the owner, he who borrowed them shall be charged with them, in law and conscience. Noy's Maxims, 91. Bythewood's Ed. 211.(κ)

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[(κ) So it has been decided in South Carolina, "That even though the bailee used due care, if he used the property for a different purpose than that for which it was bailed, the bailee is liable. 1 Const. Rep. S. C. 127. *De Tollenere v. Fuller*. See also Code Napoleon, liv. 3. tit. 10. c. 1. s. 2. art. 1881.]

he cannot exact the same degree of management and circumspection, which he would expect from a riding-master, or an officer of dragoons.(y)

[ 66 ]

From the rule, that a borrower is answerable for *slight* neglect, compared with the distinction before made between simple *theft* and *robbery*, (z), it follows, that, if the borrowed goods be *stolen* out of his possession by any person whatever, he must pay the worth of them to the lender, unless he prove that they were purloined notwithstanding his *extraordinary* care. The example given by *Julian* is the first and best that occurs : *Caius* borrows a silver ewer of *Titius*, and afterwards delivers it, that it may be safely restored, to a bearer of such approved fidelity and wariness, that no event could be less expected than its being stolen; if, after all, the bearer be met in the way by scoundrels, who contrive to *steal* it, *Caius* appears to be wholly blameless, and *Titius* has suffered *damnum sine injuriâ*. It seems hardly necessary to add, that the same care, which the bailee is bound to take of the *principal* thing bailed, must be extended to such *accessory* things as belong to it, and were delivered with it; thus a man who borrows a watch, is responsible for *slight* neglect of the chain and seals.

Opinion of  
Puffendorf  
disputed.

[ 67 ]

Although the laws of *Rome*, with which those of *England* in this respect agree, most expressly decide, that a borrower using more than ordinary diligence, *shall not be chargeable, if there be a force which he cannot resist*,(a) yet PUFFENDORF employs much idle reasoning, which I am not idle enough to transcribe, in support of a new opinion, namely, "that the borrower ought to indemnify the lender, if the goods lent be destroyed

(y) Dumoulin, tract. De eo quod interest, n. 185.

(z) See p. 44. and note (o).

(a) D. 44. 7. 1. 4. Ld. Raym. 916.

“by fire, shipwreck, or other inevitable accident, and “without his fault, unless his own perish with them:” for example, if *Paul* lend *William* a horse worth thirty guineas, to ride from *Oxford* to *London*, and *William* be attacked on a heath in that road by highwaymen, who kill or seize the horse, he is obliged, according to *Pufendorf* and his annotator, to pay thirty guineas to *Paul*. The justice and good sense of the contrary decision are evinced, beyond a doubt, by *M. POTHIER*, who makes a distinction between those cases, where the loan was the occasion merely of damage to the lender, who might in the mean time have sustained a loss from other accidents, and those where the loan was the sole efficient cause of his damage<sup>(b)</sup>: as if *Paul*, having lent his horse, should be forced, in the interval, by some pressing business to hire another for himself; in this case the borrower ought, indeed, to pay for the hired horse, unless the lender had voluntarily submitted to bear the inconvenience caused by the loan; for, in this sense, and in this instance, a benefit conferred should not be injurious to the benefactor. As to a condition presumed to be imposed by the lender, that he would not abide by any loss occasioned by the lending, it seems the wildest and most unreasonable of presumptions: if *Paul* really intended to impose such a condition, he should have declared his mind; and I persuade myself, that *William* would have declined a favour so hardly obtained.

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Had the borrower, indeed, been imprudent enough to leave the high road, and pass through some thicket, where robbers might be supposed to lurk, or had he travelled in the dark at a very unseasonable hour, and

Cases and distinctions.

(b) Poth. Prêt a Usage, n. 55. Puf. with Barbeyrac's notes, b. 5. c. 4. § 6.

had the horse, in either case, been taken from him or killed, he must have indemnified the owner; for *irresistible force* is no excuse, if a man put himself in the way of it by his own rashness. This is nearly the case cited by *St. German* from the *Summa Rosella*, where a loan must be meant, though the word *depositum* be erroneously used; (c) and it is there decided, that, if the borrower of a horse will imprudently ride by a ruinous house in manifest danger of falling, and part of it actually fall on the horse's head, and kill him, the lender is entitled to the price of him; but that, if the house were in good condition, and fell by the violence of a sudden hurricane, the bailee shall be discharged. For the same, or a stronger reason, if *William*, instead of coming to *London*, for which purpose the horse was lent, go towards *Bath*, or, having borrowed him for a week, keep him for a month, he becomes responsible for any accident that may befall the horse in his journey to *Bath*, or after the expiration of the week. (d)(2)(L)

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Thus, if *Charles*, in a case before put, (e) wear the masked habit and jewels of *George* at the ball, for which they were borrowed, and be robbed of them in his return

(c) Doct. and Stud. where before cited.

(d) *Ld. Raym.* 915.

(e) *P.* 50.

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(2) See *Noy's Maxims*, 92. *Bythewood's Ed.* 212.

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[(L) If a man borrow a horse for one day, and he keep him two, and the horse is lost on the second day, the bailee is liable, for he detained him wrongfully. This rule, though applied to a borrower, is applicable to bailees of every description. 1 *Pow. on Con.* 249. *Cro. Ja.* 244. The law of the Code Napoleon, corresponds with this: "Si l'emprunteur emploie la chose à un autre usage, ou pour un temps plus long qu'il ne devait, il sera tenu de la perte arrivée, même par cas fortuit." *Code Nap.* l. 3. t. 10. c. 1. s. 2. art. 1831. And see 1 *Con. Re.* s. 6. 121.



home at the usual time and by the usual way, he cannot be compelled to pay *George* the value of them ; but it would be otherwise, if he were to go with the jewels from the theatre to a gaming-house, and were there to lose them by any casualty whatever. So, in the instance proposed by *Gaius* in the Digest, if silver utensils be lent to a man for the purpose of entertaining a party of friends at supper *in the metropolis*, and he carry them *into the country*, there can be no doubt of his obligation to indemnify the lender, if the plate be lost by accident however irresistible.

There are other cases, in which a borrower is chargeable for *inevitable mischance*, even when he has not, as he legally may, taken the whole risk upon himself by express agreement. For example, if the house of *Caius* be in flames, and he, being able to secure one thing only, save an urn of his own in preference to the silver ewer, which he had borrowed of *Titius*, he shall make the lender a compensation for the loss ;(3) especially if the ewer be the more valuable, and would consequently have been preferred, had he been owner of them both : even if his urn be the more precious, he must either leave it, and bring away the borrowed vessel, or pay *Titius* the value of that which he has lost ; unless the alarm was so sudden, and the fire so violent, that no deliberation or selection could be justly expected, and

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(3) Puff. b. 5. c. 4. s. 6. Cod Nap, liv. 3. tit. 10. c. 1. s. 2. art. 1882.

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But where a slave was delivered to a person to be kept or upon trial, and the bailee, suffered the slave to go to the next village in the evening, when the slave ran away, it was held that the bailee was not responsible. *De Fouslear vs. Shotterkick* 3 v. Rep. 170.]

*Caius* had time only to snatch up the first utensil that presented itself.

Since openness and honesty are the soul of contracts,(4) and since "a suppression of truth is often as "culpable as an express falsehood,"(5) I accede to the opinion of *M. Pothier*, that, if a soldier were to borrow a horse of his friend, for a battle expected to be fought the next morning, and were to *conceal from him, that his own horse was as fit for the service*, and if the horse so borrowed were slain in the engagement, the lender ought to be indemnified; for probably the dissimulation of the borrower induced him to lend the horse; but, had the soldier openly and frankly acknowledged, *that he was*

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(4) A seller, in disposing of an article, is not bound to disclose its defects to the buyer, by the law of England, which differs in this respect from the sentiments of moral writers upon the subject (*Puff. b. 5. c. 3. s. 2. Grot. b. 2. c. 12. s. 9. Paley's Moral Philos. vol. 1. b. 3. c. 7.*;) but he must not practice any artifice to conceal them, or make any misrepresentations for the purpose of throwing the buyer off his guard. *Baglehole v. Walters*, 3 Camp. 154. *Meyer v. Everth*, 4 Camp. 22. *Pickering v. Dowson*, 4 Taun. 779. *Vernon v. Keyes*, 4 Taun. 488. In such case the maxim, *caveat emptor*, universally applies where there is no fraud; and to obtain protection from latent defects there must be an express warranty. *Parkinson v. Lee*, 2 East. 322. *Buller's Nisi Prius*, *Bridgeman's Ed.* 32.

(5) For an illustration of this principle, see the case of *Eyre v. Durnford*, 1 East, 318; where the defendant, who was referred to upon the subject of the credit of a third person, with whom the plaintiff was in treaty for the purchase of a quantity of goods, having suppressed a material circumstance within his knowledge, was holden liable for the injury resulting to the plaintiff in consequence of his misrepresentation. See *Buller's Nisi Prius*, *Bridgeman's Ed.* 32. b. "Fraud may consist "as well in the suppression of what is true, as in the representation of "what is false." *Per Chambre, J.* 3 Bos. and Pul. 371. So in the case of a false return to a mandamus, an action may be maintained, as well for a *suppressio veri*, as for an *allegatio falsi*. *King v. The Mayor and Burgesses of Lyme Regis*, 1 Douglas, 149.

*unwilling to expose his own horse*, since, in case of a loss, he was unable to purchase another, and his friend, nevertheless, had generously lent him one, the lender would have run, as in other instances, the risk of the day.

If the bailee, to use the *Roman* expression, be *IN MORA*, that is, if a legal demand have been made by the bailor, he must answer for any casualty that happens *after the demand*; unless in cases where it may be strongly presumed, that the same accident would have befallen the thing bailed, even if it had been restored at the proper time; or, unless the bailee have legally tendered the thing, and the bailor have put himself *in morâ* by refusing to accept it: this rule extends of course to every species of bailment.

[ 71 ]

“Whether in the case of a *valued loan*, or where the goods lent are *estimated at a certain price*, the borrower must be considered as bound *in all events* to restore either the things lent or the value of them,” is a question upon which the civilians are as much divided, as they are upon the celebrated clause in the law *Contractus*: five or six commentators of high reputation enter the lists against as many of equal fame, and each side displays great ingenuity and address in this juridical tournament. *D’Avezan* supports the affirmative, and *Pothier* the negative; but the second opinion seems the more reasonable. The word *PERICULUM*, used by *Ulpian*, is in itself equivocal: it means *hazard* in general, proceeding either from *accident* or from *neglect*; and in this latter sense it appears to have been taken by the *Roman* lawyer in the passage which gave birth to the dispute. But, whatever be the true interpretation of that passage, I cannot satisfy myself, that, either in the *Customary Provinces of FRANCE*, (6) or in *ENGLAND*, a

Controversy  
among the ci-  
vilians.

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(6) The borrower in this case, by the *Code Napoleon*, art. 1883, is

[ 72 ] borrower can be chargeable for all events *without his consent unequivocally given* : if *William*, indeed, had said to *Paul* alternatively, “ I promise, on my return to *Oxford*, either to restore your horse or to pay you thirty “ *guineas*,” he must in all events have performed one part of this disjunctive obligation ;(f) but, if *Paul* had only said, “ the horse, which I lend you for this journey, “ is fairly worth thirty guineas,” no more could be implied from those words, than a design of preventing any future difficulty about the price, if the horse should be killed or injured through an omission of that extraordinary diligence which the nature of the contract required.

Exceptions to the rule.

Besides the *general* exception to the rule concerning the degrees of neglect, namely, *Si quid convenit vel plus vel minus*, another is, where goods are lent for a use, in which the lender has a *common interest* with the borrower : in this case, as in other bailments *reciprocally* advantageous, the bailee can be responsible for no more than *ordinary* negligence ; as, if *Stephen* and *Philip* invite some common friends to an entertainment prepared at their joint expense, for which purpose *Philip* lends a service of plate to his companion, who undertakes the whole management of the feast, *Stephen* is obliged only to take *ordinary* care of the plate ; but this, in truth, is rather the innominate contract *do ut facias*, than a proper *loan*.

[ 73 ] Agreeably to this principle, it must be decided; that, if goods be lent for the *sole* advantage of the *lender*, the borrower is answerable for *gross* neglect only : as, if a

(f) Palm. 551.

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responsible for losses arising from accident, unless there is an express stipulation to the contrary.

passionate lover of music were to lend his own instrument to a player in a concert, merely to augment his pleasure from the performance; but here again, the bailment is not so much a *loan*, as a *mandate*; and, if the musician were to play with all due skill and exertion, but were to break or hurt the instrument without any malice or very culpable negligence, he would not be bound to indemnify the *amateur*, as he was not in want of the instrument, and had no particular desire to use it. If, indeed, a poor artist, having lost or spoiled his violin or flute, be much distressed by this loss; and a brother musician obligingly, though *voluntarily*, offer to lend him his own, I cannot agree with DESPEISSES, a learned advocate of *Montpelier*, and writer on *Roman* law, that the player may be less careful of it than any other borrower: on the contrary, he is bound in conscience at least, to raise his attention, even to a higher degree; and his negligence ought to be construed with rigour.

By the law of MOSES, as it is commonly translated, a remarkable distinction was made between the loss of borrowed cattle or goods, happening in the *absence* or the *presence* of the OWNER(7); for, says the divine legislator, "if a man borrow anight of his neighbour, and it be hurt or die, *the owner thereof not being with it*, he shall surely make it good; but if the *owner* thereof be with it, he shall *not* make it good;"(g) now it is by no means *certain*, that the original word signifies the *owner*, for it may signify the *possessor*, and the law may import, that the borrower ought not to lose sight, when he can possibly avoid it, of the thing borrowed; but if it was

Mosaic and  
Attic laws.

[ 74 ]

(g) Exod. xxii. 14, 15.

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(7) See Puff. with Barbeyrac's notes, b. 5. c. 4. s. 6. n. 2.

intended that the borrower should always answer for casualties, *except in the case*, which must rarely happen, of the owner's presence, this exception seems to prove, that no casualties were meant, but such as *extraordinary* care might have prevented; for I cannot see, what difference could be made by the presence of the owner, if the force, productive of the injury, were wholly irresistible, or the accident inevitable.

An old *Athenian* law is preserved by *Demosthenes*, from which little can be gathered on account of its generality, and the use of an ambiguous word(h): it is understood by *Petit* as relating to guardians, mandataries, and commissioners; and it is cited by the orator in the case of a guardianship. The *Athenians* were, probably, satisfied with speaking very generally in their laws, and left their juries, for juries they certainly had, to decide favourably or severely, according to the circumstances of each particular case.

[ 75 ]  
Law of  
pledges.

Doctrine of  
Lord Coke  
denied.

IV. As to the degree of diligence which the law requires from a *pawnee*, I find myself again obliged to dissent from Sir *Edward Coke*, with whose opinion a similar liberty has before been taken in regard to a *depository*; for that very learned man lays it down, that, "if goods be delivered to one as a *gage* or *pledge*, and they be *stolen*, he shall be discharged, because *he hath a property* in them: and, *therefore*, he ought to keep them no otherwise than his own(i):" I deny the first proposition, the reason, and the conclusion.

(h) Περὶ ὧν καθυφίκε τις, ὁμοίως ἀφελισκάνειν, ὥσπερ ἂν αὐτὸς ἔχῃ, Reiske' edition, 855. 3. Here the verb καθυφίεσθαι may imply slight, or ordinary, neglect: or even fraud, as *Petit* has rendered it.

(i) Inst. 89. a. 4. Rep. 83. b. (8).

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(8) See Hargrave's note (10) upon the above passage, where the

Since the bailment, which is the subject of the present article, is beneficial to the *pawnee* by securing the payment of his debt, and to the *pawnor* by procuring him credit, the rule which natural reason prescribes, and which the wisdom of nations has confirmed, makes it requisite for the person to whom a gage or pledge is bailed, to take *ordinary* care of it; and he must consequently be responsible for *ordinary* neglect. (k) This is expressly holden by BRACTON; and, when I rely on his authority, I am perfectly aware that he copied *Justinian* almost word for word, and that Lord *Holt*, who makes considerable use of his Treatise, observes three or four times, "that he was an *old* author;" (l) but, although he had

(k) Bract. 99. b.

(l) Ld. Raym. 915, 916. 919.

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learned editor, adverting to the authority of Lord C. J. Holt, who thought the reasoning in the text insufficient, also objects to the doctrine there stated. The nature and object of this species of bailment, entitles the pawnee to detain the article, until he is repaid the sum advanced upon it; but it may be observed, that where goods have been pledged by a person having a limited interest, the pawnee cannot detain them for the sum advanced, against the party entitled to it after that interest has expired. As where a tenant for life of plate, pledged it with a pawnbroker, who had no notice of the settlement under which the interest was derived; the pawnbroker was not allowed to retain the property, after the death of the tenant for life, against the remainder man, notwithstanding his ignorance of the pawnor's partial interest. *Hoare v. Parke*, 2 T. R. 376. See 16 Viner's Abr. title Pawn. 264. *Hooper v. Ramsbottom*, 4 Camp. 121. *M'Combie v. Davies*, 7 East, 5. So where a factor pledges the goods of his principal without authority, the pawnee cannot detain them against the principal, until he is repaid the sum advanced. *Paterson v. Tash*, 2 Str. 1178. *Daubigny v. Duval*, 5 T. R. 604. *M'Combie v. Davies*, 6 East, 638. *Martini v. Coles*, 1 M. and S. 140. *Shipley v. Kymer*, 1 M. and S. 484. *Kuckein v. Wilson*, 4 B. and A. 443. not even to the extent of the loan, which the factor would be entitled to, had they remained in his possession. *M'Combie v. Davies*, 7 East. 6.

been a civilian, yet he was also a great common-lawyer, and never, I believe, adopted the rules and expressions of the *Romans*, except when they coincided with the laws of *England* in his time: he is certainly the *best* of our juridical classics; and, as to our *ancient* authors, if their doctrine be *not law*, it must be left to mere historians and antiquaries; but, if it remain unimpeached by any later decision, it is not only equally binding with the most recent law, but has the advantage of being matured and approved by the collected sagacity and experience of ages. The doctrine in question has the full assent of Lord *Holt* himself, who declares it to be "*sufficient*, if "*the pawnee use true and ordinary diligence for restoring the goods, and that, so doing, he will be indemnified, and, notwithstanding the loss, shall resort to the pawnor for his debt.*"(9) Now, it has been proved, that "*a bailee cannot be considered as using ordinary diligence who suffers the goods bailed to be taken by stealth out of his custody;*"(m) and it follows, that "*a pawnee shall not be discharged, if the pawn be simply stolen from him;*"(1) but if he be forcibly robbed of it *without his fault*, his debt shall not be extinguished.

(m) P. 44. n. (o).

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(9) Ld. Raym. 917.

(1) A pawnee, and a depositary of goods for hire, are responsible for the same degree of negligence, that is, for the want of ordinary care; but where a trunk, containing goods, was deposited with an upholsterer for a reward, the contents of which were stolen by his servants notwithstanding he had put it in a place of safe custody, he was holden not responsible for the value, since he had taken as much care of them as of his own, and that positive evidence of negligence must be given to sustain such an action. The mere proof that at different times several articles of value had been stolen from the defendant, and that he had frequently been heard to complain of the dishonesty of his servants, is not sufficient. *Finucane v. Small*, 1 Esp. N. P. C. 315. The distinc-



The passage in the *Roman* institutes, which *Bracton* has nearly transcribed, by no means convinces M. LE BRUN, that a *pawnee* and a *borrower* are not responsible for one and the same degree of negligence; and it is very certain that *Ulpian*, speaking of the *Actio pignoratitia*, uses these remarkable words: "Venit in hac actione et *dolus et culpa* UT in *commodato*, venit et custodia; vis *major non venit*." To solve this difficulty *Noodt* had recourse to a conjectural emendation, and supposes UT to have been inadvertently written for AT; but if this was a mistake, it must have been pretty ancient, for the *Greek* translators of this sentence use a particle of similitude, not an adversative; there seems, however, no occasion for so hazardous a mode of criticism. *Ulpian* has not said, "*talis culpa qualis* in *commodato*; nor does the word UT imply an *exact* resemblance: he meant, that a pawnee was answerable for *neglect*, and gave the first instance that occurred of another contract, in which the party was likewise answerable for *neglect*, but left the *sort* or *degree* of negligence to be determined by his *general* rule; conformably to which he himself expressly mentions *PIGNUS* among other contracts *reciprocally useful*, and distinguishes it from *COMMODATUM*, whence the borrower *solely* derives advantage.(n.)

[ 77 ]  
Conjectural  
criticism of  
*Noodt*.

(n) Before, p. 16.

tion between a theft and robbery is clearly established in the civil law. D. 17. 2. 52. 3. See *Abbott on Shipping*, 234. n. 1. Ante p. 44. n.(o)(m)

[(m) The rule laid down by Sir William Jones in the text, viz. "that if the goods are stolen the pawnee shall not be discharged," does not appear to be the correct rule; neither is the reverse of the proposition as laid down by *Ld. Coke* correct. But the true rule is: that if the goods are stolen through the want of ordinary care in the pawnee, he is liable, otherwise he is not. *Salk.* 522. *Ld. Ray.* 917, 13. *Civil Code of Louisiana*, 446—450. 1 *Pow. on Cont.* 252.]

Case in the  
Book of Assise

[ 78 ]

It is rather less easy to answer the case in the Book of *Assise*, which seems wholly subversive of my reasoning, and, if it stand unexplained, will break the harmony of my system ;(o) for there, in an action of detinue for a hamper, which had been bailed by the plaintiff to the defendant, the bailee pleaded, " that it was delivered "to him *in gage* for a certain sum of money ; that he " had put it among his other goods ; and that all together had been *stolen* from him : " now, according to my doctrine, the plaintiff might have demurred to the plea ; but he was *driven* to reply, " that he *tendered* the " money before the *stealing*, and that the creditor refused to accept it," on which fact issue was joined ; and the reason assigned by the Chief Justice was, that, " if a man bail goods to me *to keep*, and I put them " among my own, I shall not be charged if they be " *stolen*." To this case I answer: first, that if the court really made no difference between a *pawnee* and a *depository*, they were indubitably mistaken ; for which assertion I have the authority of *Bracton*, Lord *Holt*, and *St. German*, who ranks the taker of a *pledge* in the same class with a *hirer* of goods ;(p) next, that in a much later case, in the reign of Hen. VI. where a *hiring of custody* seems to be meant, the distinction between a *theft* and a *robbery* is taken agreeably to the *Roman law*(q) ; and, lastly, that, although in the strict propriety of our *English* language, to *steal* is to take *clandestinely*, and to *rob* is to seize by *violence*, corresponding with the *Norman* verbs *embleer* and *robber*, yet those words are sometimes used inaccurately ; and I always suspected, that the case in the Book of *Assise* related to a robbery,

[ 79 ]

(o) 29 Ass. pl. 28.

(p) Doct. and Stud. dial. 2. chap. 38.

(q) Before, p. 44. note.(o)

or a taking *with force*; a suspicion confirmed beyond any doubt by the judicious *Brook*, who abridges this very case with the following title in the margin, "*Que serra al perde, quant les biens sont robbes;*"(r) and in a modern work, where the old cases are referred to, it appears to have been settled in conformity to them and to reason, "that if the pawn be laid up, and the pawnee be *robbed*, he shall not be answerable:"(s) but Lord *Coke* seems to have used the word *stolen* in its proper sense, because he plainly compares a pawn with a deposit.

If, indeed, the thing pledged be taken *openly* and *violently* through the *fault* of the pledgee, he shall be responsible for it; and, after a *tender* and *refusal* of the money owed, which are equivalent to actual *payment*, *the whole property is instantly revested in the pledgor*, and he may consequently maintain an action of *trover*:(t)(N) it is said in a most useful work, that by such tender and refusal the thing pawned "ceases to be a pledge, and becomes a *deposit*;"(u) but this must be an error of impression; for there can never be a *deposit* without the owner's consent, and a *depository* would be chargeable only for *gross* negligence, whereas the pawnee, whose

[ 80 ]

(r) Abr. tit. Bailment, pl. 7.

(s) 2 Salk. 522. (t) 29 Ass. pl. 28. Yelv. 179. Ratcliff and Davis.

(u) Law of Nisi Prius, 72. (2)

(2) In the subsequent editions of that work, the words "*and becomes a deposit*" are omitted.

[(N) It is laid down by Holt in 2 Salk 522. That if a pawnbroker refuse upon tender of the money to re-deliver the goods pledged, he may be indicted; for being secretly pawned, it may be impossible to prove a delivery in trover for want of witnesses. This appears to be the better opinion, though it is made a quere, in some of the books. See Carth Rep. 277. Salk. 309. 1 Hawk. Pl. of Cr. Curwood's Edit. 144. 1 Dane Abr. 305. 1 Bac. abr. 373.]

special property is determined by the wrongful detainer, becomes liable *in all possible events* to make good the thing lost, or to relinquish his debt.(w)(o)

(w) Ld. Raym. 917.

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[(o) *As to rights of the Pawnee.* 1. The Pawnee may maintain his action of debt for the money lent, although the pawn remains in his hands, for the pawn is a mere collateral security, and the right of action is not suspended by it. Yelv. 179. Vide 12 Mod. 564. 2 Starkie Rep. 72. 2 Stra. 919.

So he may maintain an action of debt for his money, though the goods pledged may have been recovered from him by the pawnor in an action of trover; because, though the security ceases, yet the duty remains, inasmuch as the money lent is not paid back to the party from whence it came. Cro. Ja. 243. 1 Bac. Abr. 370. But where a tender has been made to the pawnee, and he has refused to accept it, he should demand the money before he brings his action. 1 Bac. Abr. 370. Buls. Rep. 29. 31.

If A. pawn goods to B. for 25*l.* and B. delivers them over to C. and makes D. his Executor and dies, A. shall tender the 25*l.* to the executor, and not to C., for C. is no more than a bailee, and hath only the custody of them; but the qualified property of them is in D. as representative of B. and therefore to him must the tender be made; otherwise it is, in the case of a mortgage, where the tender may be to the assignee, because the property of the land is in him. Cro. Ja. 244. Yelv. 178, 179. 1 Bac. Abr. 370.

The goods taken to pledge cannot be forfeited by the pawnbroker for his offence, nor can they be taken in execution, nor attached for his debt, for the absolute property is in another, and therefore they are not alienable, nor by consequence forfeitable, because they cannot be forfeited without loss and danger to the absolute owner, and all qualified possessors take the thing, under the restriction to preserve it for the right owner. Dyer 67. b. Owen 124. 1 Bac. Abr. 370. 1 Dane Abr. 305. If the money was not paid at the day, the property became absolute at law, in the pawnee, but still the right owner has his redemption in equity, as in the case of a mortgage, and he may recover it by paying the debt and interest, but if the pawnee has sold it he cannot be compelled to re-purchase it. Shep. Touch. 106. 1 Inst. 205. 3 Atk. 395. 1 Dane Abr. 305. art. 4. s. 4.

See further as to the right and property of the pledgee in the thing

The reason given by *Coke* for his doctrine, namely, "because the pawnee has a *property* in the goods pledged," is applicable to every other sort of bailment, and proves nothing in regard to any *particular* species; for every bailee has a temporary *qualified* pro-

Lord Coke's  
reasons con-  
tested.

pledged, 15 Mass. Rep. 389. *Jarvis v. Rodgers*, 13 Ibid. 105. *Garlick v. James*, 12 Johns. Rep. 146.

*Lien.—Pawnee's right of Lien.*—Pawning, in itself, creates a right of lien. And the pawnee has a right to retain the pledge, not only as a security for the money lent upon it, but also for any other money lent to the pawnor, or debt incurred by him to the pawnee, since the pawnee's possession of the pawn. Prec. in Chan. 419. 2 Vern. Rep. 691. *Demaubray v. Metcalfe*, 1 Dan. Abr. 306.

By the civil law the pawnee might always retain the pledge not only for the sum for which it was specifically pledged, but for all other monies due to him on any account whatever. Cod. 8. 27. Hein. Elem. Juris, p. 4. s. 46. Bul. Præc. lib. 20 tit. B. s. 1.

It does not appear to be settled whether, by the Common Law, the pawnee has a right to retain the pawn for a debt due him previous to his obtaining the possession of the pawn. 15 Mass. Rep. 397.; opinion of *Wilde*, Just.

But though the *pawning* creates a lien in favour of the pawnee, he cannot have more interest in the thing pledged than the pawnor had. As if the tenant of plate for *life*, pawn it to a broker and die, and he have no notice of the pawnor's property, the pawnee has no lien on the plate as against him in remainder. 2 Term Rep. 376. *Hoare v. Parker* 1, Dane Abr. 306.

Yet it has been decided that if A. gets my goods by *fraud*, and pawns them to B. an innocent person, and for a valuable consideration, I cannot recover them of B. till his debt is paid. 5 Term Rep. 175. *Parker v. Patrick*, 1 Dane Abr. 306. See on the subject of *lien* generally, 2 Dane. Abr. 262—283.

*Redemption.—Pawnor's right of redemption.* Where no time of redemption is fixed, the pawnor has his life to redeem the pledge; but this is to be understood with this qualification, that the pawnee does not sooner call on him to redeem, which he certainly has a right to do. Before making such call, the pawnee has no right to sell the pledge; and if he does, the pawnor may recover from him the value of it at

perty in the things of which possession is delivered to him by the bailor, and has, therefore, a possessory action, (3)

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(3) A gratuitous bailee may maintain an action in his own name, for an injury occasioned by that degree of gross negligence which renders him responsible to his bailor; as where he turns a horse after dark into a strange pasture, which through a defect in the fences, which \*his neighbour is bound to repair, falls into the adjoining close, and is killed. *Rooth v. Wilson*, 1 Barn. and Ald. 59. See ante, p. 53. n. 1. So, a person who hires a chariot for the day, and furnishes it with a coachman and horses, and then lets it out for the day, may sue in his own name, for an injury to the chariot whilst in the use of the person, to whom he had let it, and may properly describe himself as the owner and proprietor. *Croft v. Alison*, 4 Barn. and Ald. 590.

A gratuitous permission to another to use a chattel does not, in contemplation of law divest the owner of the possession, but it remains constructively in him, and accordingly he may maintain an action of trespass for an injury done to it whilst it is so used. *Lotan v. Cross*, 2 Camp. 464. But the hirer for a different period, acquires an actual and exclusive possession for that time, and the owner has only a reversionary interest in the property hired, and consequently cannot maintain an action of trespass for an injury to it; his remedy must be an action upon the case. *Hall v. Pickard*, 3 Camp. 187. See *Gordon v. Harper*, 7 T. R. 9.

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the time of applying for a return, without tendering the debt, because by the wrongful sale, the pawnee has incapacitated himself to perform his part of the contract to return the pledge, and it would therefore be nugatory to make the tender. *Cortelyou v. Lansing*, 2 Cain. Ca. in. Er. 199. *McLean & Perrine v. Walker*, 10 Johns. Rep. 472. *Kemp v. Westbrook*, 1 Vez. sen. 278. Where the pledge is for an indefinite period, the pawnor should be called on to redeem, before the pawnee can dispose of the property; and if he is absent or cannot be found, judicial proceedings should be had to bar his redemption. *Garlick v. James*, 12 Johns. Rep. 146. *Hart v. Ten Eyck*, 2 Johns. C. R. 100.

Though the pawnor does not redeem during his life, yet the right of redemption descends to his executors, who may redeem after his death. *Cortelyou v. Lansing*, 2 Cain. Ca. in. Er. 199. *Bul. 29. 30. 1 Bac. Abr. 372.*

Where no time is limited for the redemption of the pledge, the Statute of Limitations will not attach. 1 Vez. sen. 278. *Kemp v. Westbrook.*

or an appeal in his own name against any stranger who may damage or purloin them.(x) By the *Roman* law, indeed, "even the possession of the depositary was

(x) Year B. 21 Hen. VII. 14. b. 15. a.

And if the pledgee becomes bankrupt, his assignee may file a bill in Chancery for the redemption of the pledge; for, being a stranger to what is due, he cannot otherwise ascertain the precise sum he is to tender. Ibid. 1 Bac. Abr. 372.

Where property is held under a pledge, the possession of the bailee is the possession of the owner; and if he sell to a third person, and the bailee will not give up the property to the vendee on being tendered the amount of the debt, or conceal the precise amount, so that no precise tender can be made, it is sufficient evidence of a conversion to sustain the action of trover by the vendee. *Ratcliff v. Vance*, 2 Con. Rep. S. C. 239.

*Assignment of Pawn.* Some have holden, that upon a valuable consideration a pledge is assignable over; and that on such assignment the tender of the money to the pledgor must be to the assignee, because the pawnbroker hath a special property, and what he hath he may transfer over. Bulst. 31. Owen 124. 1 Bac. Abr. 372.

But if a thing is not in my possession, I cannot grant it as a pawn, though I have a right to it; for a naked right is not transferrable over. 2 Rol. Rep. 439. 1 Bac. Abr. 372. See also *Ratcliff v. Vance*, 2 Con. Rep. of S. C. 239.

*Of Pawns by Agents and Factors.* A factor hath no authority to pledge the goods of his principal; and if he do, the latter may recover the value of them from the pawnee, on tendering to the factor what is due to him, without any tender to the pawnee. *Patterson v. Tash*, 2 Stra. 1178. *Daubigny v. Duval*, 5 Term. Rep. 604.

But in the case of *Daubigny v. Duval*, above cited, Ld. Kenyon thought that the principal was bound to make tender to the pawnee to the extent of the money due from the principal to the factor, though not beyond that sum.

An agent, to whom a power of attorney is given to sell, assign, and transfer stock, cannot pledge it for his own debt; if he does, Chancery will order the pledgee to re-transfer it. It is a principle of the law of England, as well as of the civil law, that if a person acting *ex mandato*, those dealing with him must look to his authority.

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“ holden to be that of the person depositing ;” but with us the general bailee has unquestionably a *limited* property in the goods intrusted to his care : he may not however use them on any account without the consent of the owner, either expressly given, if it can possibly be obtained, or at least strongly presumed ;(P) and this presumption varies, as the thing is likely to be better, or worse, or not at all affected, by usage ; since, if *Caius* deposit a *setting-dog* with *Titius*, he can hardly be supposed unwilling that the dog should be used for partridge-shooting, and thus be confirmed in those habits which make him valuable ; but, if *clothes* or *linen* be deposited by him, one can scarce imagine that he would suffer them to be worn ; and on the other hand, it may justly be inferred, that he would gladly indulge *Titius* in the liberty of using the *books* of which he had the custody, since even moderate care would prevent them from being injured. In the same manner it has been holden, that the pawnee of goods, which will be *impaired* by usage, cannot use them ; but it would be otherwise, I apprehend, if the things pawned actually *required* exercise and a continuance of habits, as sporting-dogs and horses : if they cannot be hurt by being worn, they may be used, but *at the peril* of the pledgee ; as, if chains of gold, ear-rings, or bracelets, be left in

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[ (P) If the pawnee use the pledge where the law does not permit him to use it, he uses it at his peril, and is liable not only for all losses during that use, but is also guilty of a conversion. 1 Leon. 224. Cro. Eliz. 219. 6 Bac. Abr. 680.

Where property is bailed for a particular purpose, if it be used for a different purpose, and a loss happens, the bailee is liable, even if it appears that he has used due care and attention ; the legal presumption being that the loss happened in consequence of the misuse. *De Tollemer v. Fuller*, 1 Rep. Con. Ct. 121.]



pawn with a lady, and she wear them at a public place, and be *robbed* of them on her return, she must make them good : “ if she keep them in a bag,” says a learned and respectable writer, “ and they are *stolen*, she shall “ not be charged ;”(y) but the bag could hardly be taken *privately and quietly* without her omission of *ordinary* diligence ; and the manner in which Lord *Holt* puts the case establishes my system, and confirms the answer just offered to the case from the Year-book ; for, “ if she “ keep the jewels,” says he, “ *locked up* in her cabinet, “ and her cabinet be *broken open*, and the jewels taken “ thence, she will not be answerable.”(z) Again ; it is said, that, where the pawnee is at any expense to maintain the thing given in pledge, as, if it be a horse or a cow, he may ride the horse moderately, and milk the cow regularly, by way of compensation for the charge ;(a) and this doctrine must be equally applicable to a general bailee, who ought neither to be injured or benefited in any respect by the trust undertaken by him ; but the *Roman* and *French* law, more agreeably to principle and analogy, permits indeed both the pawnee and the depositary to milk the cows delivered to them, but requires them to account with the respective owners for the value of the milk and calves, deducting the reasonable charges for their nourishment.(b) It follows from these remarks, that Lord *Coke* has assigned an inadequate reason for the degree of diligence which is demanded of a pawnee ; and the true reason is, that the law requires nothing *extraordinary* of him.

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(y) Law of Nisi Prius, 72. (4)

(z) Ld. Raym. 917.

(a) Ow. 124.

(b) Poth. Dépôt, n. 47. Nantissement, n. 35.

(4) See *Finucane v. Small*, 1 Esp. N. P. C. 315; ante, p. 76. 1.

[ 83 ] But, if the receiver in pledge were the only bailee who had a *special property* in the thing bailed, it could not be logically inferred, "that, therefore, he ought to keep it "merely as his own:" for, even if *Caius* have an *absolute* undivided property in goods, jointly or in common with *Septimius*, he is bound by rational, as well as positive law, to take more care of them than of his own, unless he be in fact a prudent and thoughtful manager of his own concerns; since every man ought to use *ordinary* diligence in affairs which interest another as well as himself: "*Aliena negotia*," says the emperor CONSTANTINE, "*exacto officio geruntur*." (c)

The conclusion, therefore, drawn by Sir *Edward Coke*, is no less illogical than his premises are weak; but here I must do M. *Le Brun* the justice to observe, that the argument on which his whole system is founded, occurred likewise to the great oracle of *English* law; namely, that a person who had a *property* in things committed to his charge, was only obliged to be as careful of them as of his own goods; which may be very true, if the sentence be predicated of a man *ordinarily* careful of his own; and, if that was *Le Brun's* hypothesis, he has done little more than adopt the system of *Godefroi*, who exacts *ordinary* diligence from a partner and a coproprietor, but requires a *higher* degree in eight of the ten preceding contracts.

[ 84 ] Pledges for debt are of the highest antiquity; they were used in very early times by the roving *Arabs*, one of whom finely remarks, "that the life of man is no "more than a *pledge* in the hands of destiny;" and the salutary laws of MOSES, which forbade certain implements of husbandry and a widow's raiment to be given in pawn, deserve to be imitated as well as admired. The

distinction between *pledging*, where possession is transferred to the creditor, and *hypothecation*, where it remains with the debtor, was originally *Attic*; but scarce any part of the *Athenian* laws on this subject can be gleaned from the ancient orators, except what relates to bottomry, in five speeches of *Demosthenes*.

I cannot end this article without mentioning a singular case from a curious manuscript preserved at *Cambridge*, which contains a collection of queries in *Turkish*, together with the decisions or concise answers of the MUFTI at *Constantinople*: it is commonly imagined, that the *Turks* have a translation in their own language of the *Greek* code, from which they have supplied the defects of their *Tartarian* and *Arabian* jurisprudence: (d) but I have not met with any such translation, although I admit the conjecture to be highly probable, and am persuaded that their numerous treaties on *Mahomedan* law are worthy, on many accounts, of an attentive examination. The case was this: “*Zaid* had left with *Amru* “divers goods in pledge for a certain sum of money, and “some *ruffians*, having entered the house of *Amru*, took “away his own goods, together with those pawned by “*Zaid*.” Now, we must necessarily suppose, that the creditor had by *his own fault* given occasion to this robbery; otherwise we may boldly pronounce, that the *Turks* are wholly unacquainted with the imperial laws of *Byzantium*, and that their own rules are totally repugnant to natural justice; for the party proceeds to ask, “whether, since the “debt became extinct by the loss of the “pledge, and since the goods pawned exceeded in value “the amount of the debt, *Zaid* could legally demand the “balance of *Amru*,” to which question, the great law officer of the *Othman* court answered with the brevity

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(d) Duck de Auth. Jur. Civ. Rom. I. 2. 6.

usual on such occasions, OLMAZ, *It cannot be.*(e) This custom, we must confess, of proposing cases both of law and conscience, under *feigned* names to the supreme judge, whose answers are considered as solemn *decrees*, is admirably calculated to prevent partiality, and to save the charges of litigation.

Law of hiring. V. The last species of bailment is by no means the least important of the five, whether we consider the infinite convenience and daily use of the contract itself, or the variety of its branches, each of which shall now be succinctly, but accurately examined.

Hiring of a thing.

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1. *Locatio*, or *locatio-conductio*, REI, is a contract by which the hirer gains a transient qualified property in the *thing* hired, and the owner acquires an absolute property in the stipend, or price, of the hiring; so that, in truth, it bears a strong resemblance to the contract of *emptio-venditio*, or SALE; (5) and, since it is advantageous

(e) Publ. Libr. Cambr. MSS. Dd. 4. 3. See Wotton, LL. Hywel Dda. lib. 2. cap. 2. § 29. note x. It may possibly be the usage in Turkey to stipulate "ut amissio pignoris liberet debitorem," as in C. 4. 24. 6.

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(5) For the hire or reward, answers to the price in a sale; and the right of enjoying the thing hired, to the right of property acquired by the sale. Júst. Inst. 3. 25. D. 19. 2. Grotius, b. 2. c. 12. s. 18. Puff. b. 5. ch. 6. s. 1.

A sale, by the law of England, with respect to the transfer of the property, is governed by the same general principles which regulate a sale by the civil law; and the same responsibility for neglect is exacted while the article sold remains in the possession of the seller, but the property is transferred to the buyer by the force of the sale. See ante, p. 23. n. For when the price has been agreed upon, and nothing remains to be done to ascertain the quantity or individuality of the goods, a complete right of property is transferred to the buyer. Noy's Maxims, c. 42. Bythewood's ed. 205. recognized by Lord Ellenborough, C. J. in *Hinde v. Whitehouse*, 7 East, 571. *Rugg v. Minett*, 11 East, 210. *Nanson v. Meyer*, 6 East, 614. *Wallace v. Breeds*, 13 East, 522. *Buck v. Davis*, 2 M. and S. 397. And if, before the de-

to both contracting parties, the harmonious consent of nations will be interrupted, and one object of this Essay defeated, if the laws of *England* shall be found, on a fair inquiry, to demand of the hirer a *more than ordinary* degree of diligence. In the most recent publication that I have read on any legal subject, it is expressly said, "that the hirer is to take *all imaginable* care of the goods delivered for hire:" (f) the words *all imaginable*, if the principles before established be just, are too strong for practice, even in the strict case of *borrowing*; but, if we take them in the mildest sense, they must imply an *extraordinary* degree of care; and this doctrine, I presume, is founded on that of Lord Holt, in the case of *Coggs and Bernard*, where the great judge lays it down, "that, Lord Holt's doctrine explained.  
"if goods are let out for a reward, the hirer is bound to  
"the UTMOST diligence, such as the MOST diligent father

(f) Law of Nisi Prius, 3d edition, corrected, 72.

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livery, the thing sold die, or is consumed by the fire, the loss will fall upon the buyer. Noy's Maxims, 42. Rugg v. Minett, 11 East. 210. 2 Bl. Comm. 448.

The effect of the contract, when complete, is, to transfer to the buyer the right of property in the article sold, together with a right to a delivery upon payment of the stipulated price, and to vest in the seller a right to the price, and to the fulfilment of the contract within a reasonable time, and, until that period, to retain possession of the property. See the cases *supra*, and *Lanfort v. Administratrix of Tiler*, 1 Salk. 113. 2 Bl. Comm. 448. but see *Greaves v. Ashlin*, 3 Camp. 426.

The statute of frauds, 29 Car. II. c. 3. s. 17. has not altered the common law in these respects, but merely superadded certain formalities to the conditions required by the common law for the prevention of fraud, and establishing the contract upon more satisfactory proof than mere parol declarations. See *Rann v. Hughes*, 7 T. R. 350. n. (a) *Will's Saund*, 211. n. 2.

[ 87 ] “ of a family uses.” (g) It may seem bold to controvert so respectable an opinion ; but, without insisting on the palpable injustice of making a *borrower* and a *hirer* answerable for precisely the *same* degree of neglect, and without urging that the point was not then before the court, I will engage to show, by tracing the doctrine up to its real source, that the *dictum* of the Chief Justice was entirely grounded on a grammatical mistake in the translation of a single *Latin* word.

In the first place, it is indubitable that his lordship relied *solely* on the authority of *Bracton*, whose words he cites at large, and immediately subjoins, “ *whence it appears,*” &c. Now, the words, “ *talis ab eo desideratur custodia, qualem DILIGENTISSIMUS paterfamilias suis rebus adhibet,*” on which the whole question depends, are copied exactly from *Justinian*, (h) who informs us, in the *proeme* to his *Institutes*, that his decisions in that work were extracted *principally from the Commentaries of GAIUS* ; and the epithet *diligentissimus* is in fact used by this ancient lawyer, (i) and by him alone, on the subject of hiring ; but *Gaius* is remarked for writing with energy, and for being fond of using *superlatives*, where all other writers are satisfied with *positives* ; (k) so that his forcible manner of expressing himself, in this instance, as in some others, misled the compilers employed by the Emperor, whose words *Theophilus* rendered more than literally, and *Bracton* transcribed ; and thus an epithet, which ought to have been translated *ordinarily* diligent, has been supposed to mean *extremely* careful. By rectifying this mistake, we restore the broken harmony of the

[ 88 ] *Pandects* with the *Institutes*, which, together with the

(g) *Ld. Raym.* 916.

(h) *Bract.* 62. b. *Justin. Inst.* 3. 25. 5. where *Theophilus* has ὁ σφόδρα ἐπιμελής.

(i) *D.* 19. 2. 25. 7.

(k) *Le Brun.* p. 93.

*Code, form one connected work,(l) and, when properly understood, explain and illustrate each other; nor is it necessary, I conceive, to adopt the interpretation of M. DE FERRIERE, who imagines, that both Justinian and Gaius are speaking only of cases, which from their nature demand extraordinary care.(m)*

There is no authority then against the rule, which requires of a *hirer* the same degree of diligence that *all prudent men*, that is, *the generality of mankind*, use in keeping their own goods,(6) and the just distinction between *borrowing* and *hiring*, which the *Jewish* lawgiver emphatically makes, by saying, “if it be an hired thing, “*it came for its hire*,”(n) remains established by the concurrent wisdom of nations in all ages.(q)

Rules and remarks.

If *Caius*, therefore, hire a horse, he is bound to ride it

(l) Burr. 426.

(m) Inst. vol. v. p. 138.

(n) Exod. xxii. 15.

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(6) This principle was recognized in the case of *Dean v. Keate*, 3 Camp. 4. where the defendant, who had hired a pair of job coach horses, having himself, instead of calling in a farrier, imprudently prescribed for one of the horses which had fallen ill, in consequence of which it died, was holden responsible for the loss, by reason of his not having exercised that degree of care which might be expected from a prudent man towards his own horse. But had he called in a farrier, he would not have been responsible for the medicines he might have prescribed. S. C.

In an action for not taking proper care of a hired horse, whereby his knees were broken, the plaintiff must give some positive evidence of negligence; and it is not enough to prove, that the animal was returned by the defendant with his knees broken, and that before that time he had often been let out to hire, and had never fallen down. *Cooper v. Barter*, coram Le Blanc J. Lancaster Lent assizes, 1810. 3 Camp 5. n.

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((q) And in conformity with the opinion of Sir W. Jones, is the decision of the Supreme Court of New-York, in the case of *Miller v.*

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as moderately, and treat it as carefully, as any man of common discretion would ride and treat his own horse; and if, through his negligence, as by leaving the door of his stable open at night, the horse be *stolen*, he must answer for it; but not, if he be *robbed* of it by highwaymen, unless by his imprudence he gave occasion to the robbery, as by travelling at unusual hours, or by taking an unusual road;(7) if, indeed, he hire a carriage and any number of horses, and the owner send with them his postilion or coachman, *Caius* is discharged from all attention to the horses, and remains obliged only to take ordinary care of the glasses and inside of the carriage, while he sits in it.(8)

Since the negligence of a servant, *acting under his master's directions, express or implied*, is the negligence of the master,(9) it follows, that, if the *servant* of *Caius* injure or kill the horse by riding it immoderately, or, by

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Salisbury, 13 Johns. Rep. 211.; that if a horse be hired to go on a journey, and during the due prosecution of the journey, without any ill treatment by the hirer, become lame, the hirer is not answerable for damages.

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(7) Vide 2 Lord Raym. 087.

(8) So, if horses are hired to draw a private carriage, but are driven by the servants of the stable keeper who lets them out, he will be liable for any injury done by them in the course of their journey. *Sammel v. Wright*, 5 Esp. N. P. C. 263. But if two persons hire a horse and chaise on their joint account, both are answerable for any accident arising from the misconduct of either in the driving of the chaise while it is in their joint care. *Davey v. Chamberlain*, 4 Esp. N. P. C. 229. However, if a person, driving his own carriage, were to invite another to accompany him, he would not be responsible for any misconduct in the driving by the proprietor of the carriage. S. C.

(9) See Noy's Maxims, c. 44. Bythewood's ed. 217. 1 Bl. Comm. 431. 1 Lord Raymond, 739. *Bush v. Steinman*, 1 Bos. and Pul. 404. *Harris v. Baker*, 4 M. and S. 27. *Nicholson v. Mounsey*, 15 East,



leaving the stable-door open, suffer thieves to steal it, *Caius* must make the owner a compensation for his loss ;(o) and it is just the same, if he take a ready-furnished lodging, and his guests, or servants, while they act under the authority given by him, damage the furniture by the omission of ordinary care. At *Rome* the law was not quite so rigid ; for *POMPONIUS*, whose opinion on this point was generally adopted, made the master liable only *when he was culpably negligent in admitting careless guests or servants*, whose bad qualities he ought to have known :(p) but this distinction must have been perplexing enough in practice, and the rule which, by

(o) Salk. 282. Ld. Raym. 916.

(p) D. 19. 2. 11.

384. *Bowcher v. Noidstrom*, 1 Taun. 568. *Ellis v. Turner*, 8 T. R. 533. But the act must be done in the master's service, and in obedience to his orders, for the master is not responsible for an injury wilfully committed by the servant, without his knowledge or assent. Where a servant of the defendant wilfully drove his chariot against the plaintiff's chaise, by which he was thrown out and considerably hurt, but the defendant was not present, nor did he in any manner direct or assent to the act of the servant, it was decided, that the owner of the chaise could not maintain an action of trespass against the master. *M'Manus v. Cricket*, 1 East, 106. And in a late case, where an action was brought, and damages recovered for an injury sustained by the plaintiff's chariot being overturned by the defendant's carriage, in which it appeared, that the accident arose from the defendant's servant striking the plaintiff's horses when the two carriages were entangled, in consequence of which they moved forward, and the carriage was overturned, this distinction was laid down by the court : " If a servant driving a carriage, in order to effect some purpose of his own, wantonly strikes the horses of another person, and produce the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes but injudiciously, and in order to extricate himself from the difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment." *Croft v. Alison*, 4 B. and A. 590.

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making the head of a family answerable indiscriminately for the faults of those whom he receives or employs, compels him to keep a vigilant eye on all his domestics, is not only more simple, but more conducive to the public security, although it may be rather harsh in some particular instances.(q) It may here be observed, that this is the only contract to which the *French*, from whom our word *bailment* was borrowed, apply a word of the same origin; for the letting of a house or chamber for hire is by them called *bail à loyer*, and the letter for hire, *bailleur*, that is, *bailor*, both derived from the old verb *bailler*, to deliver; and, though the contracts which are the subject of this Essay be generally confined to *moveable* things, yet it will not be improper to add, that, if *immoveable* property, as an orchard, a garden, or a farm, be letten on parol, with no other stipulation than for the price or rent, the lessee is bound to use the same diligence (1) in preserving the trees, plants, or im-

(q) Poth. Louage, n. 193.

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(1) In this case a contract is implied by law, on the part of a tenant that he will occupy the farm in a husbandlike manner, and the mere relation of landlord and tenant is a sufficient consideration for the tenant's promise to manage a farm in that mode, according to the custom of the country. *Powley v. Walker*, 5 T. R. 573. *Leigh v. Hewit*, 4 East, 154. The repair of the fences also devolves upon the tenant; and if any injury accrues to another by reason of their being out of repair, the action should be brought against the occupier, and not the owner of the fee. "It is," Lord Kenyon, C. J. observed, "so notoriously the duty of the actual occupier to repair the fences, and so little the duty of the landlord, that, without any agreement to that effect, the landlord may maintain an action against the tenant for not so doing, upon the ground of the injury done to the inheritance." *Cheetham v. Hampson*, 4 T. R. 318. *Payne v. Rogers*, 2 H. Bl. 350. *Vide Gibson v. Wells*, 1 Bos. and Pul. N. R. 290. *Brown v. Crump*, 1 Marsh R. 567.

plements, that *every prudent person* would use, if the orchard, garden, or farm, were his own.(R)

2. *Locatio OPERIS*, which is properly subdivisible into two branches, namely, *faciendi*, and *mercium vehendarum*, has a most extensive influence in civil life ; but the principles by which the obligations of the contracting parties may be ascertained, are no less obvious and rational, than the objects of the contract are often vast and important.(r) Hiring of work.

If *Titius* deliver silk or velvet to a tailor for a suit of clothes, or a gem to a jeweller to be set or engraved, or timber to a carpenter for the rafters of his house, the tailor, the engraver, and the builder,(2) are not only

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(r) It may be useful to mention a nicety of the Latin Language in the application of the verbs *locare* and *conducere*; the employer, who gives the reward, is *locator operis*, but *conductor operarum*; while the party employed, who receives the pay, is *locator operarum*, but *conductor operis*. Heinecc. in Pand. par. 3. s. 320. So, in Horace,

“ Tu secunda marmora

“ Locas”—

which the stonehewer or mason *conduxit*.

(2) Contracts of this nature can only arise from the mutual assent of both parties ; for persons of the above description are not, like common carriers, innkeepers or farriers, obliged to perform the work belonging to their respective occupations, but having performed it according to their undertaking, they are entitled to detain the article until they are paid the charges for their workmanship. Elsee v. Gatward, 5 T. R. 150. ante, 54. n. 4. The obligation of restoring the subject of the bailment, after the object for which it was deposited has been completed, must therefore be qualified by this right of lien. And in any of the above cases, wherever a debt accrues to the bailee from the bailor, in consequence of the bailment, as when the tailor has made the suit for which the cloth was delivered. 2 Roll. Abr. 92. (M.) pl. 1.; or the jeweller has set or engraved the seal; or where a horse has been agisted by the farmer, or corn ground by the miller,

[ (A) Where a chattel is let for hire, the bailor is not bound to keep it in repair; it is the bailee's business. Taylor v. Whitehead, Doug. 720. Pomfret v. Bicroft, 1 Saund, 321.

obliged to perform their several undertakings in a workmanly manner,<sup>(s)</sup> but *since they are entitled to a reward*, either by express bargain or by implication, they must also take *ordinary* care of the things respectively bailed to them : and thus, if a horse be delivered either to an agisting farmer for the purpose of depasturing in his

(s) 1 Ventr. 268. erroneously printed 1 Vern. 268. in all the editions of Bl. Comm. ii. 452. The innumerable multitude of inaccurate or idle references in our best reports and law tracts, is the bane of the student and of the practiser.

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Chase v. Westmore, 5 M. and S. 180, the bailee has a lien upon the subject of the bailment, which he cannot be compelled to re-deliver until his demand has been previously satisfied. This right, by the common law, attaches only upon the particular article in respect of which the charges have been incurred, but may be extended, by agreement between the parties, to all the articles in the possession of the person entitled to it, not only for the charges with respect to them, but also for charges upon articles previously delivered, but not satisfied. Kirkman v. Shawcross, 6 T. R. 17. Rushforth v. Hadfield, 6 East, 519. 7 East, 224. But where a quantity of goods are delivered in separate parcels at different times, yet if the agreement under which the work is done be entire, the right of lien attaches upon each part for the expenses arising with respect to the whole. Blake v. Nicholson, 3 M. and S. 167. Chase v. Westmore, 5 M. and S. 181. A more extended lien, however, may exist by a special agreement between the parties ; and where a person has given notice to his employer that he will not take in goods, without having a lien for his general balance, and goods are sent after such notice, then the bailee can detain the bailment until he is paid all that is due to him. Persons also in particular trades, as dyers, bleachers, &c. may join in such resolution, and their customers, who have had notice of it, will be bound by its terms. Kirkman v. Shawcross, 6 T. R. 14. A bailee, having a qualified property in the subject of the bailment, and being responsible to his bailor for the safe custody of it, may maintain an action for any injury which it may sustain. The bailor may also have an action, but not both of them, for he that first begins the action must go on with it, and judgment obtained by one is a good bar to the action of the other. Flewellin v. Rave, 1 Bulstrode, 69. Rooth v. Wilson, 1 Barn. and Ald. 59. 1 Wms.' Saund. 47 e. n. 1. 2 Bl. Comm. 395.

meadows, or to an hostler to be dressed and fed in his stable, the bailees are answerable for the loss of the horse, if it be occasioned by the *ordinary* neglect of themselves or their servants. It has, indeed, been adjudged, that, if the horse of a guest be sent to pasture by the owner's desire, the innholder is not, as such, responsible for the loss of him by theft or accident ;(t) and in the case of *Mosley and Fosset*, an action against an agister for keeping a horse so negligently that it was stolen, is said to have been held maintainable only by reason of a *special* assumption ;(u) but the case is differently reported by *Rolle*, who mentions no such reason ; and, according to him, Chief Justice *Popham* advanced generally, in conformity to the principles before established, that, " if a man, to whom horses are bailed " for agistment, leave open the gates of his field, in consequence of which neglect they stray and are stolen, " the owner has an action against him : " it is the same if the innkeeper send his guest's horse to a meadow of his own accord, for he is bound to keep safely all such things as his guests deposit within his inn,(3) and shall not discharge himself by his own act from that obligation ; and even when he turns out the horse by order of the owner, and receives pay for his grass and care, he is chargeable, surely, for ordinary negligence, as a bailee for hire, though not as an innkeeper by the general custom of the realm. It may be worth while to investigate the reasons of this general custom, which, in truth, means no more than common law concerning innholders.(w)

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Law concerning innholders.

(t) 8 Rep. 32. Calye's case.

(u) Mo. 543. 1. Ro. Abr. 4.

(w) Reg. Orig. 105. a. Noy. Max. ch. 43.

(3) See page 94 c. n. 5.

Although a stipend or reward in *money* be the essence of the contract called *locatio*, yet the same responsibility for neglect is justly demanded in any of the *innominate* contracts,(4) or whenever a valuable consideration of any kind is given or stipulated. This is the case where the contract *do ut des* is formed by a *reciprocal bailment for use*; as if *Robert* permit *Henry* to use his *pleasure-boat* for a day, in consideration that *Henry* will give him the use of his *chariot* for the same time; and so in ten thousand instances, that might be imagined, of *double bailments*: this too is the case if the *absolute* property of one thing be given as an equivalent for the *temporary* or *limited* property of another, as if *Charles* give *George* a brace of pointers for the use of his *hunter* during the season. The same rule is applicable to the contract *facio ut facias*, where two persons agree to perform *reciprocal works*; as if a mason and a carpenter have each *respectively* undertaken to build an edifice, and they mutually agree, that the first shall finish all the masonry, and the second all the wood-work, in their respective buildings; but, if a goldsmith make a bargain with an architect to give him a quantity of wrought plate for building his house, this is the contract *do ut facias*, or *facio ut des*; and in all these cases, the bailees must answer for the omission of *ordinary* diligence in preserving the things with which they are intrusted: so, when *Jacob* undertook the care of *Laban's* flocks and herds for no less a reward than his younger daughter, whom he loved so passionately, *that seven years were in his eyes like a few days*, he was bound to be just as vigilant as if he had been paid in shekels of silver.

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(4) See Halifax's Analysis of the Roman Civil Law, 62. Wood's Institutes of the Civil Law, 206. 2. Bl. Comm. 444. where the nature of this species of contract is explained and illustrated.

Now, the obligation is precisely the same, as we have already hinted, (x) when a man takes upon himself the custody of goods *in consequence and consideration of another gainful contract*; and though an innholder be not paid in money for securing the traveller's trunk, yet the guest *facit ut faciat*, and alights at the inn, not solely for his own refreshment, but also that his goods may be safe: independently of this reasoning, the custody of the goods may be considered as *accessary* to the principal contract, and the money paid for the apartments as extending to the care of the box or portmanteau; in which light *Gaius* and, as great a man as he, Lord *Holt*, seem to view the obligation; for they agree, "that, although  
 " a bargeman and a master of a ship receive their fare  
 " for the passage of travellers, and an innkeeper his pay  
 " for the accommodation and entertainment of them,  
 " but have no pecuniary reward for the *mere custody* of  
 " the goods belonging to the passengers or guests, yet  
 " they are obliged to take *ordinary* care of those goods;  
 " as a fuller and a mender are paid for their *skill only*,  
 " yet are answerable, *ex locato*, for *ordinary* neglect, if  
 " the clothes be lost or damaged." (y)

In whatever point of view we consider this bailment, no more is *regularly* demanded of the bailee, than the care which *every prudent man* takes of his own property; but it has long been holden, that an *innkeeper* is bound to restitution, if the trunks or parcels of his guests, committed to him either personally, or through one of his agents, be damaged *in his inn*, or *stolen out of it* by any person whatever; (z) (5) nor shall he discharge himself

(x) P. 49, 60.

(y) D. 4. 9. 5. and 12 Mod. 487.

(z) Year B. 10. Hen. VII. 26. 2 Cro. 189:

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(5) This proposition is laid down rather too extensively; for an inn-

from this responsibility by a refusal to take any care of the goods, *because there are suspected persons in the*

keeper will not be responsible, if the guest be robbed by his own servant, or companion, or any one whom he desires to be lodged with him; for in these cases, the loss is rather attributable to the guest, than to any fault on the part of the innkeeper. *Calve's Case*, 8 Rep. 33. *Noy's Maxims*, Bythewood's ed. 213. *Edwards' Case*, Cro. Eliz. 285. *Burgess v. Clements*, 4 M. and S. 311.

The liability of an innkeeper, as defined by a writ of trespass in the *Registrum Brevium*, fo. 105. *Fitz. N. B.* 94. against an innkeeper, for the loss of the goods of his guest, which is the foundation of the common law upon this subject, and upon which *Calve's case*, 8 Rep. 32. is a commentary, is not so extensive as that of a common carrier; yet upon principles of public policy is greater than what, according to the principle contained in this essay, would be exacted from him by reason of his reward. According to the terms of that writ, an innkeeper, who keeps a common inn for the entertainment of travellers, is bound to take care of the goods and chattels of his guest, which are within his inn, without loss or damage, so that no injury arises by any means through the default of him, or his servants. *Vide Beedle v. Morris*, Cro. Jac. 224. *Cross v. Andrews*, Cro. Eliz. 622. *Noy's Maxims*, Bythewood's Ed. 213. 1 Com. Dig. 298. 1 Roll. Abrid. 2. (D.) 1. 4.

An inn may be defined to be a house kept open publicly, for the lodging and entertainment of travellers and others, paying a reasonable compensation for the accommodation which is professed to be given. *Calve's case*, 8 Rep. 32. *Parkhurst v. Foster*, Carth. 417. *Thompson v. Lacy*, 3 Barn. and Ald. 285. It is said if a man puts a sign at his door, and harbours guests, that shall be deemed a common inn, and the owner chargeable as an innkeeper: and that if, after taking down the sign, he continues to entertain travellers, it shall be deemed a common inn, as if he had a sign. 2 Roll. Rep. 344, 5. A sign is not essential to an inn, but is evidence of it. Per Holt, C. J. in *Parker v. Flint*, 12 Mod. 255. But a person who lived at Epsom, and lodged strangers in the season for drinking the waters, and dressed victuals for them, and sold beer to his lodgers, and to none else, and found hay for their horses, is not an innkeeper, nor can his house be considered as an inn. *Parkhurst v. Foster*, Carth. 417. 5 Mod. 427. 1 Salk. 387. S. C.

A house of public entertainment in London, in this case, a tavern



house for whose conduct he cannot be answerable: (a) it is otherwise, indeed, if he refuse admittance to a traveller

(a) Mo. 78.

and coffee-house, where lodging and entertainment are provided for travellers and others indiscriminately, but which was not frequented by stage-coaches, and waggons, and had no stables belonging to it, was considered as an inn, and the owner subject to the liabilities of an innkeeper, even where the guest did not appear to have been a traveller, but one who had previously resided in ready furnished lodgings. *Thompson v. Lacy*, 3 Barn. and Ald. 285.

In a case where a question arose whether a coffee-house came within the description of an inn in a policy of insurance against fire, enumerating the trade of an innkeeper with others as doubly hazardous, Lord Ellenborough, C. J. observed, "I think a coffee-house is not an inn, within the meaning of the policy. Horses, waggons, and coaches come to an inn, there are stables and outhouses attached to it, people are going to these with lights at all hours; hence there is an increased danger of fire, and the trade of an innkeeper is considered doubly hazardous. But the trade of a coffee-house keeper is of a very different description." *Doe, ex dem. Pitt, v. Laming*, 4 Camp. 77.

Common inns, according to the commentary in Calve's case, 8 Rep. 32., were instituted for passengers and wayfaring men, for the latin word for an inn is *diversorium*, because he who lodges there is *quasi divertens se a via*, and therefore if a neighbour who is not a traveller, at the request of the innkeeper, lodges there as a friend, and his goods are stolen, he shall not have an action. *Vide* 1 Roll. Abr. 3. (E.) pl. 4. So if a man hires a chamber for a term, or sojourns in an inn upon a special agreement. *Latch.* 127. *Moore*, 877. Per *Holt*, C. J. in *Parker v. Flint*, 12 Mod. 254. or if a person be a guest, but deliver the goods to an innkeeper upon another account. 1 Roll. Abr. 3 (E.) pl. 1. the innkeeper is not chargeable. But a person who continues for a week or more; or goes out, and says that he will return at night, *Drope v. Thaire*, 1 *Latch.* 127. *Moore*, 837. *Gelley v. Clark*, Cro. Jac. 189. or if, during a temporary absence, he leaves goods, as a horse, from which the owner may derive a profit on account of their keep, *Gelley v. Clark*, Cro. Jac. 189. *Buller*, N. P. 72. *Bridgeman's Ed. York v. Grindstone*, 1 Salk. 388. 2 L. Ray. 866. S. C. such person will be entitled to be considered as a guest. But if the goods are

because he really has no room for him, and the traveller, nevertheless, insist upon entering, and place his baggage in a chamber without the keeper's consent.(b)

(b) Dy. 158. b. 1 And. 29.

such as the innkeeper can derive no benefit from on account of their keep, a guest will not continue to be such after he has quitted the inn, *Gelley v. Clark*, *supra*. So if a servant come into an inn and ask to leave his master's goods till the next market day, and the innkeeper refuses, because his house is full of parcels, and the servant sit down and drink as a guest, and put the goods behind him, and they are lost, the innkeeper is liable to the master. *Bennett v. Mellor*, 5 T. R. 273.

Duties of an innkeeper.

An innkeeper is bound to receive a guest, having room for him, and if he refuse, without a reasonable ground for his refusal, as on a false pretence that his house is full, he will be liable to an action. *Dyer*, 158. b. 1 Roll. Abrid. 3. (F.) pl. 1. 2 Roll. Rep. 345. Carth. 418. 1 Hawk. P. C. 225. 52. Per Buller and Grose, J. in *Bennett v. Mellor*, 5 T. R. 274. But an innkeeper does not absolutely engage to receive every person who comes to his house, but only those who are capable of paying a compensation suitable to the accommodation provided. Per Abbot, C. J. and Bailey, J. in *Thompson v. Lacy*, 3 Barn. and Ald. 285.

An innkeeper is also bound to take care of the goods of his guest being within his inn, although the guest neither delivers them to the innkeeper, nor acquaints him with them.(τ) *Calye's case*, 8 Rep. 33.

[(τ) In the case of *Quinton v. Courtney*, Hayw. North Car. Rep. 41. a traveller who had saddle bags, in which were two hundred dollars, upon alighting at the inn, delivered the bags to a servant of the tavern-keeper, but did not inform either the servant or tavern-keeper that money was in the bags. These bags were placed in the bar-room, and were afterwards found on the lot, cut open, and the money gone, it was held that the innkeeper was liable. So in the case of *Clute v. Wiggins*, 14 Johns. Rep. 175. It was decided that to make the innkeeper liable it was not necessary that the goods should be delivered into his special keeping; nor to prove negligence. But if the trust was not reposed in the innkeeper, but in another person, who was not in the capacity of a servant, but occasionally in the business of the family, the case is taken out of the general rule, and the innkeeper is not liable. 1 Yeates' Rep. 34.

Add to this, that if he fail to provide honest *servants*, and honest *inmates*, according to the confidence reposed

Noy's Maxims, 92. Bythewood's Ed. 213. But if an innkeeper refuse to receive a guest because his house is really full, and yet the party says he will shift for himself, if he be robbed, the innkeeper is discharged. White's case, Dyer, 158. b. Doct. and Stu. 238, 239. F. N. B. 94. 95. Dyer, 266. This liability extends to all goods, by the loss of which damage may arise to the guest, as deeds, bonds, or other specialties, but does not extend to any personal injury to the guest; but only to his moveables. Calye's case, 8. Rep. 33. 2 Roll. 58. Dyer, 5. pl. 2. Yelv. 68. But they must be within the inn at the time of the loss, for if the horse of the guest be put out to pasture at his own desire, and it is then stolen, the innkeeper will not be responsible; but if he do it without the guest's order, he will remain liable. Calye's case, 8 Rep. 32. Noy's Maxims, 93. Bythewood's Ed. 213. So if the guest leave the goods in an outer court, in consequence of which they are stolen, the innkeeper is not responsible. Noy's Maxims, 93. Bythewood's Ed. 213.

A traveller for orders who put up at the defendant's inn, had appropriated to him, at his own desire, a private room which opened into a gateway leading to the street, for the purpose of showing his goods to his customers. After dining in the traveller's room, where upon his arrival he had been conducted, and his goods placed, he removed to the private room, and while displaying his goods, which consisted chiefly of articles of jewellery, he was twice interrupted by a stranger. There was a key to the door, which he was told he might have, but upon his leaving the inn he did not lock the door, nor did he know that he even shut it, and upon his return in the evening, two of his boxes were missing. In an action against the innkeeper for the loss of the goods, a verdict was found in his favour, which was afterwards sanctioned by the court, upon the ground, that the room was not assigned to the traveller merely as a guest, but for a purpose for which the innkeeper was not bound to provide it, and which led to the introduction of persons over whom he had no controul, and that after the interruption of the stranger, it became the duty of the traveller to use ordinary care for the preservation of his goods, and that it was owing to his neglect, and not to the fault of the innkeeper, that the loss had happened. Burgess v. Clements, 4 M. and S. 306.

From this obligation the innkeeper cannot discharge himself, and de-

in him by the public, his negligence in that respect is highly culpable, and he ought to answer *civilly* for their

feat the provisions of the law by any act of his own, as by putting his guest's horse out to pasture without his consent. Calye's case, sup. So, "it is no excuse for an innkeeper to say that he delivered the key of the chamber-door to his guests, in which he is lodged, and that he left the chamber door open; but he ought to keep the goods and chattels of his guests in safety." 22 H. VI. 21. 11 H. IV. 45. 42 Ed. III. 11. Calye's case, 8 Rep. 33. But if there is evidence that he accepted the key, and took upon himself the care of his goods, it will be for a jury to determine whether this evidence of his receiving the key proves that he did it *animo custodiendi*, and with a purpose of exempting the innkeeper, or whether he took it merely because the landlord forced it upon him, or for the sake of securing greater privacy, in order to prevent persons from intruding themselves into his room. Burgess v. Clements, 4 M. and S. 310. Nor can he discharge himself by a plea that he was sick, and of non-sane memory, at the time the guest lodged with him, for an innkeeper must at his peril keep safely his guest's goods; and if he be sick, his servant then ought carefully to look to them. Cross v. Andrews, Cro. Eliz. 622. The liability of the innkeeper extends only to losses which arise from his want of care, or that of his servants, and not to an injury committed by the King's enemies. Plow. Com. 9. l. Nor to any damage arising from the default of the guest. Calye's case, 8 Rep. 23. Noy's Maxims, Bythewood's Ed. 213. And therefore, if an innkeeper requires his guest to lock up his goods in such a chamber, or he will not warrant their safety, and the guest suffers them to lie open in an outer court, the host is not liable if they are stolen. Sanders v. Spencer, Dyer, 266. l. Noy's Maxims, Bythewood's Ed. 213.

The keeper of an hotel is not liable to pay for the washing of the linen of the guests at his house. Callard v. White, 1 Stark. N. P. C. 171.

**Right of lien.** An innkeeper, like a common carrier, is entitled to a right of lien upon the goods of the guest, and may detain them for what is due to him for the lodging and entertainment provided for the guest, until the debt is paid. York v. Grindstone, 1 Salk. 388. Thompson v. Lacy, 3 B. and A. 285. Nor can the guest defeat this right by directing that the horse shall not have any more food, but he shall pay for it afterwards, otherwise the innkeeper shall lose the horse, which is his security. Per Holt, C. J. Skinner, 648. But on the other hand, the innkeeper cannot sell the goods detained; for, like a distress at common

acts, even if they should rob the guests who sleep in his chambers.(c) Rigorous as this law may seem, and hard

(c) 1 Bl. Comm. 430.

law, the detention is only to insure the payment due to the innkeeper. 2 Roll. Abr. 85 A. pl. 5. Bulst. 207. Bac. Abr. tit. *Inns*. He has no power, therefore, to sell his guest's horse when he has eaten his value, but such right may exist by special custom, as in London and Exeter. 2 Roll. Abr. 85. (A.) pl. 6. Moor, 376. *Baldway v. Ouston*, 1 Vent. 71. In trover against an innkeeper, for the sale of horses belonging to his guests, to indemnify him for their keep, which exceeded their value, it was holden on demurrer, that an innkeeper has no power to sell horses, except within the City of London, and that when the horses had been once out, the power of detaining them for what was due before did not subsist at their coming in again. *Jones v. Pearle*, 1 Str. 556.

The remedies against an innkeeper for the loss or injury of goods are similar to those against a common carrier. See post, 103 n. 3. A master may maintain an action in his own name for property stolen from his servant, while a guest at the defendant's inn. *Beedle v. Morris*, Crò. Jac. 224. *Drope v. Thaire*, Latch. 127. *Robinson v. Walter*, 1 Roll. Abrid. 3. l. 40. *Bennett v. Mellor*, 5 T. R. 273. But it appears that if a person take another's horse to an inn, without the owner's consent, where it is stolen, the owner cannot maintain an action against the innkeeper, for he was not his guest. 1 Roll. Abr. 3. l. 32. See 1 Com. Dig. 297. Yelv. 162. In an action against an innkeeper for property stolen out of his inn, the declarations must allege that he kept a common inn. *Saunders v. Spencer*, Dyer, 266. C. but the custom of the realm need not be set out, and if it is, a mis-recital will not prejudice the case. Latch. 127. Chitty on Pleading, 2 vol. 322. n. e.

In an action of trover against an innkeeper for a horse detained for his keep, a denial is not evidence of a conversion, unless the plaintiff tender what the horse has eaten out, and it is a question for the jury to determine whether sufficient were tendered, *Anon.* 2 Show. 161. *Buller's Nisi Prius*, Bridgeman's Ed. 72.

To sustain this action, the plaintiff must prove all the material allegations in his declaration, as, in addition to proof of the loss of the goods, that the defendant kept a common inn, and that he, his son, or servant, was a guest at the time, and that the goods were brought within the inn, and remained under the care of the defendant. *Buller N. P.* 72. *Bridgeman's Ed.* But it is not necessary to prove negligence on

as it may actually be in one or two particular instances, it is founded on the great principle of public utility, to which all private considerations ought to yield; for travellers, who must be numerous in a rich and commercial country, are obliged to rely almost implicitly on the good faith of innholders, whose education and morals are usually none of the best, and who might have frequent opportunities of associating with ruffians or pilferers, while the injured guest could seldom or never obtain legal proof of such combinations, or even of their negligence, if no actual fraud had been committed by them. Hence the Prætor declared, according to POM-  
PONIUS, *his desire of securing the public from the dishonesty of such men*, and by his edict gave an action against them, if the goods of travellers or passengers were lost or hurt by any means, except *damno fatali*, or by *inevitable accident*; and Ulpian intimates, that even this severity could not restrain them from knavish practices or suspicious neglect. (d)

(d) D. 4. 9. 1. and 3. (6)

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the part of the innkeeper, per Buller, J. in *Bennett v. Meller*, 5 T. R. 276. The loss of the goods being *prima facie* evidence of negligence on his part, which it is incumbent upon him to repel by showing that the loss was not occasioned by his fault, or that of his servants. See p. 96.

(6) The comment, and the complaint, of Ulpian are thus expressed :  
 “Maxima utilitas est hujus edicti : quia necesse est plerumque eorum  
 “fidem sequi, et res custodiæ eorum committere. Neque quisquam  
 “putet graviter hoc adversus eos constitutum : *nam est in ipsorum ar-*  
 “*bitrio, ne quem recipiant*, et nisi hoc esset statutum, materia daretur  
 “cum furibus, adversus eos quos recipiunt coeundi : cum ne nunc qui-  
 “dem abstineant hujusmodi fraudibus.” It will be obvious that the  
 part of Ulpian’s reason “*nam est*,” &c. includes an option of receiving  
 or refusing guests, in which the Roman *cauponæ* differed from our modern  
 innkeepers, the latter being liable to an action if they refuse,

In all such cases, however, it is competent for the innholder to repel the *presumption* of his knavery or default, by *proving* that he took *ordinary* care, or that the *force* which occasioned the loss or damage, was truly *irresistible*.(v)

When a private man demands and receives a compensation for the *bare custody* of goods in his warehouse or store-room, this is *not* properly a *deposit*, but a *hiring of care and attention*: it may be called *locatio custodiae*, and might have been made a distinct branch of this last sort of bailment, if it had not seemed useless to multiply subdivisions; and the bailee may still be denominated *locator operæ*, since the *vigilance and care* which he lets out for pay, are in truth a mental operation. Whatever be his appellation, either in *English* or *Latin*, he is clearly responsible, like other interested bailees, for *ordinary negligence*; (7) and although *St. German* seems to

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Remarks on  
St. German.

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without an adequate reason, to admit and accommodate a traveller. *Black. Com.* vol. 3. p. 164. 6 Term Rep. 276.

(7) A warehouseman, or depositary of goods for hire, is responsible only for ordinary negligence, and consequently is not liable for a loss arising from accident, where he is in no default.

A common carrier, from Stourpoint to Manchester, undertook to carry goods from the former to the latter place, and to forward them from thence to Stockport. Upon his arrival at Manchester, the goods were deposited in his warehouse to await an opportunity of sending

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[(v) Quere. Is the innkeeper liable for losses occasioned by *common robbery*? I have met with no adjudicated cases on this point; but I see no reason why he should not be liable as well as a common carrier. The rule of the Code Napoleon appears to be founded on reason, and to draw the proper line of distinction on this subject. Where the robbery is by an armed or superior force, the innkeeper is not liable. "Ils ne sont pas responsables des vols faits avec force armée ou autre force majeure." Code Napoleon, Livre 2. tit. 9 ch. 2 s. 5.]

make no difference in this respect between a *keeper of goods for hire*, and a *simple depositary*; yet he uses the word

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them forward by the Stockport carrier, there being none there at that time, to whom goods sent from Stourpoint to go beyond Manchester were immediately delivered, on payment of the price of the carriage from Stourpoint to Manchester. No distinct price was charged for the goods while they were in the warehouse at Manchester, nor would they be deposited there, if the Stockport carrier was ready to receive them upon their arrival at that place. The goods, while they remained in the warehouse, and before they could be forwarded in the usual way, were destroyed by an accidental fire. The carrier was holden not to be liable for the loss, for his duty as a carrier having terminated, the depositing the goods in his warehouse invested him only with the character of a warehouseman, and in that capacity he was not responsible for an injury arising from no want of negligence on his part. *Garside v. The Proprietors of the Trent and Mersey Navigation*, 4 T. R. 581. *Vide Hyde v. The Trent and Mersey Navigation Company*, 5 T. R. 389. *Roskell v. Waterhouse*, 2 Stark. N. P. C. 462. So where a quantity of ginseng, deposited in the defendant's warehouse, was destroyed by rats, notwithstanding the defendant took the precaution to shut the lid of the box every night, after it had been opened during the day by the owner, for the purpose of showing it to purchasers, and adopted reasonable precautions to destroy vermin, he was holden not liable for the damage, since the responsibility of a warehouseman was not similar to that of a common carrier, and that he had exerted all due and common diligence for the preservation of the commodity. *Cailliff v. Danvers, Peake*, N. P. C. 114. See *Finucane v. Small*, 1 Esp. N. P. C. 315. ante p. 76. n. 9. The liability of a warehouseman commences the instant the goods are placed in his hands, and, in the case of goods delivered by a carman, attaches from the time the crane is applied to raise them into the warehouse. From that moment he becomes liable for any loss or injury they may sustain by means of his default, and it is no defence that they were injured by falling into the street from the breaking of the tackle, the carman who brought the goods having refused the offer of slings which was made for further security. *Thomas v. Day*, 4 Esp. N. P. C. 262. In an action against a depositary of goods for hire, positive evidence of negligence must be given; for mere proof of the loss of the goods is not sufficient to put the defendant on his defence. *Finucane v. Small*, 1 Esp. N. P. C. 316.



DEFAULT, like the *CULPA* of the *Romans*, as a generical term, and leaves the *degree* of it to be ascertained by the rules of law.(e)

In a sentence immediately following, he makes a very material distinction between the two contracts; for, "if a man," says he, "have a *certain recompense* for the keeping of goods, and promise at the time of delivery, to re-deliver them safe at his *peril*, then he shall be charged with *all chances* that may befall; but if he make that promise, and have *nothing* for keeping them, he is bound to *no casualties* but such as are *wilful*, and happen by his *own default*:" now, the word PERIL, like *periculum*, from which it is derived, is in itself ambiguous, and sometimes denotes the *risk* of *in-avoidable mischance*, sometimes the *danger* arising from a want of due *circumspection*; and the stronger sense of the word was taken in the first case against him who uttered it: but in the second, where the construction is favourable, the *milder* sense was justly preferred.(f) Thus, when a person, who, if he were wholly *uninterested*, would be a *mandatary*, undertakes for a *reward* to perform any work, he must be considered as bound still more strongly to use a *degree of diligence adequate to the performance of it*: his obligation must be rigorously construed, and he would, perhaps, be answerable for *slight neglect*, where no more could be required of a *mandatary* than *ordinary exertions*. This is the case of *Law concerning factors and traders* commissioners, factors,(8) and bailiffs,(9) when their

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(e) Dect. and Stud. where before cited.

(f) See before, p. 46.

(8) See *Mainwaring v. Brandon*, 3 J. B. Moore, 125. *Moore v. Mourgue*, 2 Cowp. 479. *Boville and another v. Bradbury*, 1 Stark. N. P. C. 136.

(9) A bailiff is a servant, who has administration and charge of lands,

undertaking *lies in feaſance*, and not ſimply in *cuſtody*: hence, as peculiar care is demanded in removing and raising a fine column of granite or porphyry, without injuring the ſhaft of the capital, *Gaius* ſeems to exact *more than ordinary* diligence from the undertaker of ſuch a work for a ſtipulated compensation. *(g)* Lord *Coke* conſiders a factor in the light of a *ſervant*, and thence deduces his obligation; but, with great ſubmiſſion, his *reward* is the true reaſon, and *the nature of the buſineſs* is the juſt meaſure, of his duty; *(h)* which cannot, however, extend to a reſponſibility for *mere accident* or *open robbery*; *(i)* and even in the caſe of *theft*, a factor has been holden excuſed when he ſhewed “that he “ had *laid up* the goods of his principal in a warehouse, “ out of which they were *ſtolen* by certain malefactors “ to him unknown.” *(k)(v)*

*(g)* D. 19. 2. 7.

*(h)* 4 Rep. 84. Ld. Raym. 918.

*(i)* 1 Inſt. 89. a.

*(k)* 1 Vent. 121. Vere and Smith.

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goods, and chattels, to make the beſt benefit for the owner. Againſt ſuch bailiff an action of account lies for the profits he hath raiſed or made, or might by his induſtry or care have reaſonably raiſed or made, his reaſonable charges and expenſes being deducted. See 1 Inſt. 172. a.

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[*(v)* *Agents and Factors—reſponſibility of.* The reſponſibility of an agent may be limited or extended by an agreement made at the time of entering into the contract; it being a maxim that *conventio vincet legem*; he may, accordingly, by expreſs agreement, make himſelf anſwerable for inevitable accidents; but ſuch agreement muſt clearly appear; it cannot be preſumed. *Pothier du Contrat de Mandat*, n. 50. *Bridge v. Auſten*, 4 Maſs. Rep. 114. But an agreement to exempt from reſponſibility for fraud, is indecent, and can have no effect. *Nicholſon v. Willan*, 5 Eaſt, 513.

Where a principal is informed by his agent of what he has done, the principal muſt expreſs his diſſatisfaction in a reaſonable time; other-

Where *skill* is required, as well as *care*, in performing the work undertaken, the bailee for *hire* must be suppo-

wise his assent to his agent's act will be presumed. *Cairnes & Lord v. Bleecker*, 12 Johns. Rep. 300. *Vianna v. Barclay*, 2 Cowen's Rep. 281.

Where an agent is authorized to deliver goods to a third person, on receiving sufficient security for the amount, and the agent delivers the goods, but does not take sufficient security, trover will not lie against the agent for the goods, but the proper remedy is case. *Ibid.* Also, 5 Munf. Rep. 34.

Where the power of an agent is limited by instructions, he is bound to pursue those instructions. If he deviate from his orders, though with a view to his employer's interest, he will be liable for consequences. *Sadock v. Burton*, Yelv. 202. *Emergon*, tom. 1. page 143. *Wilkinson et al. v. Neal*, 1 Bay Rep. 169. *Liver. on Agency*, 368.

Necessity, however, will sometimes justify a factor in acting contrary to orders; particularly if induced by some cause not in the contemplation of the principal at the time he gave the orders. *Dusar et al. v. Perit*, 4 Bin. Rep. 361. *Manella, Pujals & Company v. Barry*, 3 Cranch 415.

An agent employed to effect an insurance, for which he is to have no remuneration, is not merely answerable for wilful negligence, but also for inadvertence, mistake, and misconstruction of orders, provided the instructions are sufficiently explicit. *Rundle and others v. Moore et al.* 3 Johns. Ca. 35.

A factor employed to make sale of goods on consignment, is not only bound to good faith, but also to reasonable diligence. If, therefore, notwithstanding an authority to sell on credit, he sell to one who is insolvent or doubtful; and the fact, upon reasonable diligence, might have been known, he is answerable for the loss. In such case the sale will in law be deemed a sale on account of the factor. *Burrill v. Phillips*, 1 Gallis. Rep. 360. *Leverick v. Meigs & Read*, 1 Cowen Rep. 645.

Where a factor sells goods on credit, according to the usual course of trade, where he has no orders to the contrary, he shall not be liable in case of the purchaser's becoming insolvent. *James & Shoemaker v. McCredie & Co.* 1 Bay Rep. 294. *Godenou v. Tyler*, 7 Mass. Rep. 36. *Vanalen et al. v. Vanderpool*, 6 Johns. Rep. 69.

But a factor is bound to sell for ready money, unless he has discretionary powers, or orders to the contrary, or unless the usage and course of trade at the place where the sales are made will warrant

sed to have engaged himself for *a due application of the necessary art*: it is his own fault if he undertake a work

a sale on credit. *James v. McCredie*, 1 Bay, 294. and see *Greely v. Bartlett*, 1 Green. Rep. 172.

A usage proved among factors of allowing a week or fortnight to pay where the sale has been for cash, does not authorize a factor to deviate from positive instructions to sell for cash. *Barksdale v. Brown*, 1 Nott & McCord, 517. See the case of *Clark v. Van Northwick*, 1 Pick. Rep. 343.

An agent who had received depreciated paper money during the revolutionary war, was held not to be liable for it in any other way. *Bellinger v. Gervais*, 1 Dess. Eq. Rep. 174.

If a factor receives and sells the goods of his principal, without any special orders as to remittance, upon an understanding express or implied, that he is to hold the proceeds to the order of his principal, and he does nothing in violation of those orders, or to disable himself from complying with them when received, and transmits a true account of sales in a reasonable time, according to the course of business, and is ready to remit or answer draughts upon him, no action will lie against him for the balance in his hands. *Clark v. Moody*, 17 Mass. Rep. 145. And see *Ferris v. Parris*, 10 Johns. Rep. 285. And see further as to liability of agents, *Cheviot v. Brooks*, 1 Johns. Rep. 364. 3 Mass. Rep. 434.

*Authority of Agents and Factors.*—The authority of a general agent is restrained to the transactions and concerns appurtenant to the business of the principal. *Odiorne v. Maxey*, 13 Mass. Rep. 178.

An agent constituted for a particular purpose, and under a power limited and circumscribed, cannot bind his principal, by any act in which he exceeds his authority, *Thompson v. Stewart*, 3 Conn. Rep. 171. *Beals v. Allen*, 18 Johns. Rep. 363. *Leverick v. Meigs & Read*, 1 Cowen, 645.

A factor in a foreign country, from whom property consigned to him is taken for a breach of the revenue laws of the country, must nevertheless account for the property, unless he can show that in the management of it he conformed to the laws of such country; or that he was authorized by special instructions from his principal to act as he did; or that the property could not be managed in any other manner than that in which he attempted to manage it; and that this was a fact known to his principal when he made the consignment. *Wellman v. Nutting*, 3 Mass. Rep. 434.]

above his strength; and all that has before been advanced on this head concerning a *mandatary*, may be applied with much greater force to a *conductor operis faciendi*.(l) I conceive, however, that, where the bailor has not been deluded by any but himself, and voluntarily employs in one art a man who openly exercises another, his folly has no claim to indulgence; and that, unless the bailee make false pretensions, or a *special* undertaking, no more can fairly be demanded of him than the best of his ability.(m) The case which SADI relates with elegance and humour in his *Gulistan* or *Rosegarden*, and which *Puffendorf* cites with approbation,(n) is not inapplicable to the present subject, and may serve as a specimen of *Mahomedan law*, which is not so different from ours(1) as we are taught to imagine: "A man

[ 99 ]

"who had a disorder in his eyes, called on a *farrier* for  
 "a remedy; and he applied to them a medicine com-  
 "monly used for his patients: the man lost his sight,  
 "and brought an action for damages; but the judge  
 said, "No action lies, for if the complainant had not  
 "himself been an *ass*, he would never have employed a  
 "*farrier*;" and *Sadi* proceeds to intimate, that, "if a  
 "person will employ a common *mat-maker* to weave or  
 "embroider a *fine carpet*, he must impute the bad  
 "workmanship to his own folly."(o)

Mahomedan law.

[ 100 ]

In regard to the distinction before mentioned between

(l) *Spondet*, say the Roman lawyers, *peritiam artis*.

(m) P. 54

(n) *De Jure Nat. et. Gent. lib. 5. cap. 5. s. 3.*

(o) *Rosar. Polit. cap. 7.* There are numberless tracts in Arabic, Persian, and Turkish, on every branch of jurisprudence; from the best of which it would not be difficult to extract a complete system, and to compare it with our own: nor would it be less easy to explain in Persian or Arabic such parts of our English law, as either coincide with that of the Asiatics, or are manifestly preferable to it.

(1) See *Slater v. Baker*, 2 Wils. 359. *Sears v. Prentice*, 8 East, 343.

the *non-feasance* and the *mis-feasance* of a workman, (p) it is *indisputably* clear, that an action lies in *both* cases for a reparation in damages, whenever the work was undertaken for a *reward*, either actually paid, *expressly* stipulated, or, in the case of a *common* trader, strongly *implied*; of which BLACKSTONE gives the following instance: "If a *builder* promises, undertakes, or assumes "to *Caius* that he will build and cover his house within "a time limited, and fails to do it, *Caius* has an action "on the case against the builder for this breach of his "express promise, and shall recover a pecuniary satisfaction for the injury sustained by such delay." (q) The learned author meant, I presume, a *common* builder, (2) or supposed a *consideration* to be given; and for this reason I forbore to cite his doctrine as in point on the subject of an action for the *non-performance* of a *mandatary*. (r) (w)

Rules and distinctions.

Before we leave this article, it seems proper to remark, that every bailee for *pay*, whether *conductor rei* or *conductor operis*, must be supposed to know that the goods and chattels of his bailor are in *many cases* *distrainable* for rent, if the landlord, who might otherwise

(p) P. 54, &c.

(q) 3 Comm. 157.

(r) P. 56, 57. 61.

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(2) See ante, p. 54. n. (4.)

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[(w) In the case of *Thorne and Thorne v. Dias*, 4 Johns. Rep. 83. Ch. J. Kent combats the doctrine of Sir W. Jones, and shows conclusively, that by the common law, a mandatary, or one who undertakes to do an act for another without reward, is not answerable for omitting to do the act; and is only responsible where he attempts to do it, and does it amiss. In *Rutgers v. Lucet*, 2 Johns. Ca. 92. the court say, that a mere agreement to undertake a trust, *in futuro*, without

be shamefully defrauded, find them on the premises ;(s) and, as they cannot be distrained and sold without his ordinary default *at least*, the owner has a remedy over against him, and must receive a compensation for his loss : (t) even if a *depository* were to remove or conceal *his own* goods, and those of his depositor were to be seized for rent-arrière, he would unquestionably be bound to make restitution; but there is no obligation in the bailee to *suggest wise precautions against inevitable accident*; and he cannot, therefore, be obliged to *advise insurance from fire*; much less to *insure* the things bailed without an authority from the bailor. [ 102 ]

It may be right also to mention, that the distinction, before taken, in regard to *loans*, (u) between an obligation to restore the *specific* things, and a power or necessity of returning *others equal in value*, holds good likewise in the contracts of *hiring* and *depositing*: in the first case, it is a regular *bailment*; in the second, it becomes a *debt*. Thus, according to ALFENUS in his famous law, on which the judicious *Bynkershoek* has learnedly commented, " if an ingot of silver be delivered to a silver-smith to make an urn, the *whole* property is transferred, and the employer is only a *creditor* of metal equally valuable, which the workman engages to *pay* in a certain shape : " (w) the smith may consequently apply

Celebrated  
law of Alfenus.

(s) Burr. 1498, &c.

(t) 3 Bl. Comm. 8.

(u) P. 64, 65.

(w) D. 19. 2. 81. Bynk. Obs. Jur. Rom. lib. VIII.

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compensation, is not obligatory; but when once *undertaken*, and the trust actually *entered upon*, the bailee is bound to perform it according to the terms of his agreement. See also, *Elsee v. Gatwood*, 5. Term Rep. 150. opinion of Ashurst, J. and 1 Esp. N. P. Cas. 75.

A mere mandatary who receives no reward, is liable only for *fraud* or *gross neglect*. *Stanton v. Bell*, 2 Hawks. 145.]

it to his own use ; but if it perish, even by unavoidable mischance or irresistible violence, he, as owner of it, must abide the loss, and the creditor must have his urn in due time. It would be otherwise, no doubt, if the same silver, on account of its peculiar fineness, or any uncommon metal, according to the whim of the owner, were agreed to be specifically redelivered in the form of a cup or a standish.(x)

[ 103 ]

Hiring of carriage.

3. *Locatio operis* MERCIUM VEHENDARUM is a contract which admits of many varieties in form, but of none, as it seems at length to be settled, in the substantial obligations of the bailee.

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[(x) If a person having charge of the property of another, so confounds it with his own, that it cannot be distinguished, he must bear all the inconvenience of the confusion, and he must distinguish his own property, or lose it; and if damages are given against him, it will be to the utmost value of the article. *Hart v. Ten Eyck*, 2 Johns. Ch. Ca. 108. *Lupton v. White*, 15 Ves. Rep. 32.

But where no inconvenience results to the owner from the mixture, and the property is lost by an accident totally unconnected with the mixture, there appears to be no good reason why the bailee should bear the loss. This distinction is sanctioned by the opinion of Ch J. Spencer, in the case of *Seymour v. Brown*, 19 Johns. Rep. 44. Thus, where a person sent to a miller a quantity of wheat, to be exchanged for flour, and the miller mixed it with a mass of wheat of the same quality belonging to himself and others; but before the flour was delivered to the plaintiff, the mill of the defendant, with all its contents, wheat and rye flour, was entirely destroyed by fire, from some unknown cause, and without any fault or negligence on the part of the defendant; it was held that the defendant was not responsible for the loss of the plaintiff's wheat, there being no contract of sale by which the property was transferred to the defendant. A similar decision was also made in the case of *Slaughter v. Green and others*, 1 Rand. Virgin. Rep. 3. where wheat was delivered at a mill to be ground, upon an agreement that the miller should return to the farmer a given quantity of flour for so many bushels of wheat, the miller was considered as a bailee, and not a purchaser; and therefore the wheat being consumed



A *Carrier for hire* ought, by the rule, to be responsible only for *ordinary* neglect ;(3) and in the time of HENRY

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by accidental fire, was held not responsible for it. And this conclusion would not be altered by an understanding between the parties, that the miller is not bound to return flour made from that identical wheat, but flour of a certain quality made from any wheat in the mill.

Where wheat is delivered at a mill to be ground, upon an agreement that the miller shall return to the farmer a given quantity of flour for so many bushels of wheat, the miller is a bailee, and not a purchaser; and therefore, if the wheat be consumed by accidental fire, the miller will not be responsible for it. The conclusion will not be altered by an understanding between the parties, that the miller is not bound to return flour made from that identical wheat, but flour of a certain quality made from any wheat in the mill. *Slaughter v. Green et al.* 1 Randolph's Rep. 3. See also the case of *T. & H. Seymour v. Brown et al.* 19 Johns. Rep. 44.]

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(3) This extensive and important species of bailment, far more so than any of the others, from its daily concurrence to an immense extent in this great commercial country, and the numerous questions of importance which are continually arising upon it, requires to be examined more in detail. For this purpose, in the examination of the subject, it is proposed to consider, first, who are those persons who may be considered as common carriers, or, who, not being such, nevertheless render themselves liable to similar duties by their private engagements; secondly, the duties of a common carrier; and, thirdly, his rights. As, however, the effect of a bailment of this nature is very frequently to introduce another party, who is entitled to demand a delivery of the goods, and to insist upon a compensation for the loss or damage they may sustain in the course of their conveyance, it is proposed to consider, fourthly, the effect of a delivery of goods to a carrier on behalf of a purchaser, as between the consignor and the consignee, and the right of the consignor to stop them in transitu; and in the last place will be considered, the remedies which may

VIII., it appears to have been generally holden, "that  
" a *common carrier* was chargeable, in case of a loss by

be adopted against the carrier for the breach of his engagements, and the evidence required on those occasions.

Description of  
common carriers.

Persons who come within the description of common carriers, are all persons who carry goods generally for hire. But no special agreement for a reward is requisite to bring a person within this description; for, since he is entitled by law to a reasonable reward, he is as much liable as if there were a special agreement for a sum certain. *Bastard v. Bastard*, 2 Show. 81. *Rogers v. Head*, Cro. Jac. 222. *Harris v. Packwood*, 3 Taun. 272. [*McClures v. Hammond*, 1 Ray. Rep. 99. *Harrington v. Tyles*, 2 Nott & McC. 88.] Within this class of persons are included the proprietors of stage-waggons, and of stage-coaches, who carry goods as well as passengers for hire, the master and owner of ships, hoymen, lightermen, barge-owners, ferrymen, and wharfingers. [But a person who receives and forwards goods, taking upon himself the expenses of transportation, for which he receives a compensation from the owner of the goods, but has no concern in the vessels by which they are forwarded, or interest in the freight, is not a common carrier. *Roberts v. Turner*, 12 Johns. Rep. 232.]

[ 103a. ]

Proprietors of  
stage waggons.

The proprietors of stage-waggons have at all times been considered as common carriers, and appear to be peculiarly the object of the law in this respect. [If a waggoner by whom goods are sent to be delivered to A. sell them openly in a street of a city to B. the sale vests no property in the purchaser. *Leeky v. McDermott*, 8 Serg. & Raw. 500.] See cases, *infra*. So where a person who brought goods to London on his private account, and on his return in the country took such goods as he could obtain; the court decided, that any man undertaking for hire to carry the goods of all persons indifferently, was so far a common carrier as to protect the goods from a distress. *Gisbourne v. Hurst*, 1 Salk. 249.

Proprietors of  
stage-coaches.

The proprietors of stage-coaches, in the conveyance of passengers, are not liable for the same responsibility which is im-

*“ robbery, only when he had travelled by ways dangerous  
“ for robbing, or driven by night, or at any inconvenient*

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posed upon them in the carriage of goods ; and if their employment extended only to the former service, they would not be considered as common carriers. *Christie v. Griggs*, 2. Camp. 79. *White v. Boulton*, Peake N. P. C. 80. *Aston v. Heaven*, 2 Esp. N. P. C. 533. If, however, they carry goods as well as passengers for hire, they will come within that description ; and accordingly, in an action for the loss of a passenger's luggage, it was decided, that if a coachman commonly carry goods, and take money for so doing, he will be in the same case with a common carrier, and is a carrier for that purpose, whether the goods belong to a passenger or a stranger. Per *Jones, J.* in *Lovett v. Hobbs*, 2 Show. 128. A distinct charge for the goods as well as for the passenger was formerly deemed to be necessary ; and in an action against the master of a stage-coach, for the loss of a trunk belonging to the plaintiff, (a passenger,) which was delivered to the driver, and stolen in the course of the journey, it was holden that this action did not lie against the master, and that a stage-coachman was not within the custom as a carrier is, unless such as take a distinct price for the carriage of goods as well as persons, as waggon, with coaches. Per *Holt, C. J.* in *Middleton v. Fowler*, Salk. 282. So a hackney coachman was holden not to be a common carrier within the custom of the realm, and could not be charged for the loss of a passenger's goods, except where there was a special agreement and money paid for the carriage of the goods. Per *Holt, C. J.* in *Upshare v. Aidee*, Comy. 25. But since it may reasonably be presumed, that the care of the luggage is an inducement for the passenger to take his place, and that the coachmaster, like an innkeeper (ante, p. 94.) includes in the fare his charge for such responsibility ; the same principles of public policy which invest him with the character and responsibility of a common carrier, when he charges a distinct price for the carriage of goods, would appear to require a similar rule when no such charge is made,

"hour;"(x) but in the commercial reign of ELIZABETH, it was resolved, upon the same broad principles of policy

(x) Doct. and Stad. where often before cited.

but the goods are received as accompanying the passenger. The point does not appear to have been judicially decided in any modern reported case; but Mr. Justice Chambre, in delivering his opinion in the case of *Robinson v. Dunmore*, 2 Bos. and Pul. 419. observed, that it had been decided, that if a man travel in a stage-coach, and take his portmanteau with him, though he has his eye on the portmanteau, yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost. So, in an action for the value of a passenger's trunk, which was stolen in the course of the journey, and for the carriage of which no distinct charge appears to have been made; the defendant insisted that he was not responsible for the loss, inasmuch as he was exempted by a general notice not to be liable for parcels above the value of 5*l.*, unless entered as such and paid for accordingly: the plaintiff's counsel insisted that the notice applied only to goods sent to be carried, and not to the case of a passenger's luggage. But Lord Ellenborough observed, that the luggage of passengers came within the exception: *Clark v. Gray*, 4 Esp. 177. 6 East, 564. S. C. [The practice of carrying for hire in a stage-coach parcels not belonging to passengers constitutes the proprietors of the coach common carriers, and they will be held liable for the loss of such a parcel by the driver, who was one of the proprietors. *Dwight et al. v. Brewster*, 1 Picker. Rep. 50.]

Masters of  
vessels.

The master of a vessel also comes within the description of a common carrier, for he is rather in the nature of a confidential officer, than a servant, although he is paid by the owners. In the case of *Morse v. Slue*, 2 Lev. 69. 1 Vent. 190. 228. Sir Thomas Raymond, 220. which was an action brought against the master of a vessel for the loss of goods which happened without his default, it was objected that the action should have been brought against the owners of the vessel, and not against the

and convenience that have been mentioned in the case of *innholders*, "that, if a *common carrier* be robbed of

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master, who was no more than a servant to them at a certain salary; but the court decided that he was responsible as master, and that the case was not different from a common hoyman, a common carrier, or innkeeper. See Abbot on Shipping, 234. 4th ed.

[Masters and owners of vessels, who undertake to carry goods for hire, are liable as common carriers, whether the transportation be from port to port, within the state, or beyond sea, at home or abroad, and they are answerable, as well by the *marine law* as by the common law of England, for all losses not arising from inevitable accidents, or such as could not be foreseen or prevented. *Elliot & Stewart v. Rossell & Lewis*, 10 Johns. Rep. 1. *Clark and others v. Richards*, 1 Conn. Rep. 54. 5 Day. Rep. 415.]

The owners of a vessel are also common carriers equally with a carrier by land, and are liable, in respect of the freight, for goods spoiled by default of the master; but they must be charged on the custom of the realm, or as usually carrying goods for hire. *Boucher v. Lawson*, Ca. temp. Hard. 104. *Boson v. Sandford*, Salk. 440. 3 Lev. 258. 1 Show. 29. 2 Show. 478. Skin. 278. 3 Mod. 321. Carth. 58. S. C. See Abbott on Shipping, 231. 4th ed. As a shipmaster, or keelman who carries goods from port to port. *Dale v. Hall*, 1 Wils. 281. So a hoyman, by the custom of the realm, is a common carrier. 1 Roll. Abr. 2. c. 2, pl. 2. See *Wardell v. Mourillyan*, 2 Esp. N. P. C. 693. So an action lies equally against a common barge-man without any special agreement, as against a common carrier. *Rich. v. Kneeland*, Cro. Jac. 330. Hob. 18. And in the same manner it lies against a ferryman. See p. 108.

Owners of  
vessels.

[ 103c. ]

[Where the master of a vessel received several hogsheads of gin on board; to transport from Hartford to Boston, at customary freight, which was stowed on deck, and ejected during the voyage by reason of tempestuous weather, it was held that the

“ the goods delivered to him, he shall answer for the value of them.”(y)

(y) 1 Inst. 89. a. Mo. 462. 1 Ro. Abr. 2. Woodliffe and Curties.

owners were liable for the loss, unless such stowage were authorized by the consent of the shipper, or by custom. *Barber v. Brace*, 3 Conn. Rep. 9. *Smith v. Wright*, 1 Ca. Rep. 43.

It is sufficient to subject the owner for the acts of the master, that the latter is in fact master with the privity of the owner without any special appointment. *Clark et al. v. Richards*, 1 Conn. Rep. 54.]

**Wharfingers.** So, wharfingers are equally common carriers, between whom and other carriers no distinction can be made. *Ross v. Johnson*, 5 Burr. 2825. And in an action for the loss of goods accidentally destroyed by fire, while upon the defendants' premises, who were wharfingers, and whose duty it was to convey the goods from the wharf in their lighter to the vessel in the river, Lord Ellenborough, C. J. was of opinion, upon an objection being made as to their responsibility for the loss, that the liability of a wharfinger, whilst he has possession of the goods, was similar to that of a carrier. *Maving v. Todd*, 1 N. P. C. 72. See *Cobban v. Downe*, 5 Esp. N. P. C. 41.

**Carrier's servants.**

A common carrier is responsible for the acts of his servant or agent whom he employs in the execution of the duty which belongs to him; and no contract will be implied between the owner of the goods and the person whom the carrier may employ for that purpose; until they are performed, his character of a common carrier continues. See *Cavenagh v. Such*, 1 Price, 328. And the driver of a stage-coach, to whom a parcel is delivered, will be presumed to receive it on his master's account; and the mere previous delivery of several parcels by the driver, for which there appears no contract for the payment of a reward, will not be sufficient to render him a common carrier, so as to make him responsible for the loss of a parcel intrusted to him upon the same terms. A habit of carrying goods for hire, or some con-

Now, the *reward* or *hire*, which is considered by Sir Edward Coke as the reason of this decision, and on:

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tract indicating that the servant acted as a common carrier, and not in his ostensible capacity of a servant, is necessary to make him a carrier. *Williams v. Cranston*, 2 Stark. N. P. C. 82.

In the conveyance of letters by the post established by the government for the public convenience, and under the guidance of its own officers, regulated by various acts of parliament, the persons concerned in that employment are not considered as common carriers, although they are personally responsible for their individual neglect. In an action, therefore, against the Postmaster-General, for the loss of exchequer bills taken out of a letter delivered into the office, the court decided, contrary to the opinion of Holt, C. J., who delivered an elaborate judgment to the contrary, that the action was not maintainable. *Lane v. Cotton*, 1 Lord Raym. 646. 1 Salk. 17. So, upon the same principles, an action was holden not to lie against the Postmaster-General, for a bank-note stolen by one of the sorters out of a letter delivered into the post-office. *Whitfield v. Lord Le Despenser*, 2 Cowp. 754. See post, p. 110. n.

Officers belonging to the post-office. [ 103d. ]

A private person, who undertakes the carriage of goods, will be responsible for their safe conveyance, according to the terms of his agreement, though not as a common carrier. The chief distinctions which exist between these different persons, appear to be, that the former is not obliged, like a common carrier, to undertake the carriage of goods, and is responsible only to the extent of his contract, and not for that additional degree of responsibility which is required from a common carrier. See *Coggs v. Bernard*, 2 Lord Raym. 909. *Hutton v. Osborne*, Selwyn's Nisi Prius, 382. n. (7) 4th ed. *Robinson v. Dunmore*, 2 Bos. and Pul. 417. Thus, a person who had undertaken the carriage of goods, and warranted that they should go safe, was holden to be liable, not as a common carrier, but upon his special undertaking. *Robinson v. Dunmore*, 2 Bos. and Pul. 417. So an action lies against the commander of a ship of war, who

Private persons.

which the principal stress is often laid in our own times, makes the carrier liable, indeed, for the omission of ordi-

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takes the bullion of a private merchant on board, for not safely keeping and delivering it. *Hodgson v. Fullarton*, 4 Taun. 787.

An agreement will not be implied on the part of a servant at an inn, in order to render him responsible for goods left there for delivery by a carrier, nor will the division of the profits arising from the portorage of goods, adopted as a mode of remuneration, vary his character; and, in the case of a porter of an inn, who had charge of all parcels brought to the coach-office, and whose duty it was to deliver them to the persons to whom they were directed, and for which he received half of the portorage, it was holden, that he was not personally liable for the loss of a parcel delivered to him by the guard of a mail-coach, which stopped at the inn, but a mere servant to the proprietor, and, as such, not responsible. *Cavenagh v. Such*, 1 Price, 328. *Vide Hyde v. the Trent and Mersey Navigation Co.* 5 T. R. 397. The degree of care required of a private person who undertakes the carriage of goods for a reward, is regulated by the general rule in the text, and extends only to a responsibility for ordinary negligence. But this may be increased or diminished by particular stipulations. As where the defendant, having undertaken the conveyance of some furniture, and warranted that it should go safe, was holden responsible for damage sustained by rain in the course of the journey, and that he was not discharged from his liability by the owner sending a porter with him for the purpose of watching and taking care of the goods. *Robinson v. Dunmore*, 2 Bos. and Pul. 417.

Obligations to receive.

By the general custom of the realm, that is, by the common law, 1 Roll. Abr. 2 (C) pl. 1. 2 Bl. Comm. 67. *Rushforth v. Hadfield*, 6 East, 525. a common carrier is bound to carry the goods of the subject for a reasonable reward; and if he refuse to do so, having convenience, and being tendered satisfaction for the carriage, he will be liable to an action, unless he has reasonable ground for his refusal. *Jackson v. Rogers*, 2 Show.



nary care, but cannot extend to *irresistible force*; and though some other bailees have a *recompence*, as *factors*

129. 1 Show. 104, 105. *Morse v. Slue*, 1 Vent. 238. Bull. N. P. 70. Per Holroyd, J. in *Batson v. Donovan*, 4 B. and A. 32. 1 Wms's. Saund. 312. n. 2.

If a coachman refuse to take charge of goods, because his coach is full, and the goods are nevertheless put on the coach, without the coachman's knowledge, who, as soon as he perceives it, refuses to take charge of them, he will not be responsible for their loss. *Lovett v. Hobbs*, 2 Show. 128. So a refusal would be considered reasonable, where it appeared, that it was a time of public commotion, and that the goods which the carrier was desired to carry, were the object of popular fury, and would be attended with a risk, against which his precaution would be inadequate to secure him. *Edwards v. Sherratt*, 1 East, 604. [ 103f. ] So, it would be a reasonable excuse for not carrying goods of great value, either if it appeared that the carrier did not hold himself out as a person ready to carry all sorts of goods, or that he had no convenient means of conveying such articles with security. Per Holroyd, J. in *Batson v. Donovan*, 4 Barn. and Ald. 32.

To render a carrier responsible for goods, there must be a *Nature of Delivery* to him, or his servant, or some person acting on his behalf, so as to charge him with their custody, for otherwise there can be no inception of the contract. And, therefore, when goods were left at an inn yard, where the defendant and several other carriers put up, but without proving any delivery to him or his servant, this was holden not to be sufficient to charge the defendant with their custody. *Selway v. Holloway*, 1 Lord Raym. 46. See Buller's *Nisi Prius*, 36. *Bridgman's* ed. *James v. Jones*, 3 Esp. N. P. C. 27. *Hawkins v. Rutt*, Peake's N. P. C. 186. So, where a quantity of goods were left at a wharf, piled up among other goods, with a direction to the consignee, but no receipt was taken, nor were the goods booked, or any person belonging to the wharf fixed with a privity of

[ 103f. ] and *workmen for pay*, yet, even in *Woodliffe's* case, the Chief Justice admitted, that *robbery* was a good plea

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their being left there, the carrier was holden not to be charged with such a delivery as would render him responsible to the buyer, in the event of a loss. *Buckman v. Levi*, 3 Camp. 414.

A delivery to the mate of a vessel by a wharfinger, in the usual course of trade, will discharge him of his responsibility; for by that means the mate is charged with the care of the goods, and will be liable, although they may be lost while on the wharf. *Cobban v. Downe*, 5 Esp. N. P. C. 41.

The delivery to a carrier may be complete, so as to charge the carrier, although not sufficient to charge the purchaser, for in this latter case the delivery must be such as to give the consignee a right of action against the carrier, in the event of the loss of the goods. *Buckman v. Levi*, 3 Camp. 414. See 1 Stark. N. P. C. 17. If, therefore, goods are delivered to a carrier, without specially entering them as required by a general notice, which is known to the consignor, and the goods are lost, the buyer is not liable for their value. In this case the seller has an implied authority; and it is his duty to do whatever is necessary to secure the responsibility of the carrier for the safe delivery of the goods, and to put them in such a course of conveyance, as that, in case of a loss, the buyer might have his indemnity against the carrier. Per Lord Ellenborough, in *Clarke v. Hutchins*, 14 East, 475. But the necessity of complying with the terms of the notice may be dispensed with by the purchaser, as where goods have been previously sent without being entered and insured as above the limited sum, and no objection made upon that account. *Cothay v. Tute*, 3 Camp. 129.

[ 103g. ]

The goods must also be packed properly, and in fit condition for their journey at the time they are delivered to the carrier, for, otherwise, if any loss arise on that account during their conveyance, the carrier will not be responsible. See *Beck v. Evans*, 16 East, 245 *Stuart v. Crawley*, 2 Stark. 324. Where, however, there was a complete delivery, acknowledged by a re-

for a *factor*, though it was a bad one for a *carrier*: the true ground of that resolution is the *public employment*

ceipt, of a greyhound, which afterwards escaped, and was lost, the carrier was not allowed to set up as a defence, that the dog was not properly secured when delivered to him, for, after the delivery, he became responsible for the animal, and was bound to lock him up, or take other means to secure him. *Stuart v. Crawley*, 2 Stark. N. P. C. 323.

[Where a common carrier pays damages for the loss of goods by negligence or unskilful management, it is tantamount to a safe delivery, and he is entitled to freight. *Hammond v. McClures*, 1 Bay. Rep. 101.]

But a person delivering goods to a carrier is not bound, by the common law, to specify their equality or value, for it is the duty of the carrier to make inquiry, if he desires to secure himself against particular hazard, or to receive a larger premium. *Titchburne v. White*, 1 Str. 145. Per *Holroyd, J.* in *Batson v. Donovan*, 4 B. and A. 31. An acceptance of goods generally will, therefore, render him responsible, whatever may be their value, and notwithstanding he is ignorant of that circumstance. But if a parcel is received upon condition that there is no money in it, the carrier will not be liable, if the parcel is lost, and did in truth contain money. *Titchburne v. White*, 1 Str. 145. So, where two bags, sealed up, were delivered to the carrier, and said to contain 200*l.*; for which sum the carrier gave a receipt, when in fact it contained 400*l.*, *Holt, C. J.* decided, that the carrier was responsible only for 200*l.*, because there was a particular undertaking for the carriage of that sum; and that the reward, which was the measure of his responsibility, did not extend further. *Tyly v. Morrice*, Carth. 485. See 4 Burr. 2301. In the same manner, where the plaintiff delivered to the defendant, a carrier, a box, telling him only, "that there was a book and tobacco in the box," whereas, in fact, it contained 100*l.*, *Roll, C. J.* was of opinion, that as the carrier had not made a special acceptance, he was answerable; but, with res-

Nature of the contract.

[ 103p. ]

exercised by the carrier, and the danger of his combining with *robbers* to the infinite injury of commerce and extreme inconvenience of society.(z)

(z) Ld. Raym. 917. 12 Mod. 487.

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pect to the intended cheat upon the carrier, he told the jury they might consider him in damages, but they, notwithstanding, gave a verdict for 97l. against the carrier. "Quod," observes the reporter, "*durum videbatur circumstantibus*." *Kenrig v. Eggleston*, Aleyn, 93. So, where one brought a box to a carrier, in which there was a large sum of money, who demanded of the owner what was in it; he answered, it was filled with silks and such like goods of mean value; upon which the carrier took it, and was robbed; and resolved that he was liable. But, if the carrier had told the owner, that it was a dangerous time, and, if there was money in it he durst not take charge of it, and the owner had answered as before, this matter would have excused the carrier. *Morse v. Slue*, 1 Vent. 238. And Lord Mansfield, C. J. in *Gibbon v. Paynton*, 4 Burr. 2301. commenting on the two preceding cases, observed, that in the first case he should have agreed in opinion, *cum circumstantibus*, and that, in the second, he should have thought the carrier excused, although he had not expressly proposed a caution against being answerable for the money, for it was artfully concealed from him, that there was any money in the box. The delivery, indeed, must be free from artifice or misrepresentation, made with a view to deceive the carrier; for honesty and good faith are as requisite in this, as in every other contract, and, consequently, any concealment or fraudulent device in the delivery of goods, will discharge the carrier. See *Gibbon v. Paynton*, 4 Burr. 2298. *Batson v. Donovan*, 4 B. and A. 21. And where the carrier has given notice, that he will not be liable for parcels of value, unless they are entered, and a proportionate premium paid, this will be equivalent to a special acceptance, and render it incumbent upon the owner to disclose the value, in order to make the carrier responsible. The effect of the notice will be, when no

The modern rule concerning a *common carrier* is that "nothing will excuse him, except *the act of God*, or of

Exceptions  
from the gene-  
ral rule.

special entry is made, to entitle the carrier to consider the parcel as of an ordinary nature, and not falling within that description of goods for which he refuses to be liable without a compliance with the terms of the notice; and in such cases, the holding out, as an ordinary risk, what is, in truth, an extraordinary one, will be considered as a legal fraud. And the legal maxim applies, "*Ex dolo malo non oritur actio.*" Per Bailey, J. in *Batson v. Donovan*, 4 Barn. and Ald. 37. In the before mentioned case of *Gibbon v. Paynton*, the carrier, who was protected by a general notice, received a quantity of gold, packed in an old nail-bag, which was stuffed with hay, to give it a mean appearance. The court considered this mode of packing so valuable an article as a fraud, and, on that ground, gave judgment for the defendant. See Buller's *Nisi Prius*, 71 a. Bridgman's ed. *Batson v. Donovan*, 4 Barn. and Ald. 31. So, in the last mentioned case of *Batson v. Donovan*, where no concealment or actual fraud was practised upon the carrier: he had however given notice within the plaintiff's knowledge, that he would not be accountable for bills, bank-notes, &c. unless notice was given, and an additional premium paid; but the plaintiff, nevertheless, delivered to him a banker's parcel, containing articles of that description to a large amount, without disclosing the nature or value of its contents, and the parcel was subsequently lost; the court held, that the plaintiff, having knowledge of the notice, was bound to have informed the carrier of the value, in order to render him responsible. And Mr. Justice Bailey observed, that "the holding out as an ordinary risk, what is really an extraordinary one, is a legal fraud." 4 Barn. and Ald. 37. So, where there is a general notice not to be responsible for articles of a particular description, and goods of that nature are delivered to a carrier, whether he is to receive a reward or not, the nature and value of the parcel should be communicated, to enable him to adopt proper precautions for their safety. *Bignold v. Waterhouse*, 1 Maule and Selw. 261.

[ 104 ]

“the king’s enemies”(a) but a momentary attention to the principles must convince us, that this exception is

(a) Law of Nisi Prius, 70, 71.

[ 104a. ]

But directing a banker’s parcel, containing bank-notes and bills to a large amount, to their clerk, in order to conceal the nature of its contents, and without giving the carrier any notice of its value, will not be deemed fraudulent, so as to deprive the owner of his remedy for a loss, in a case where the carrier was deprived of the benefit of his notice by misfeasance. *Sleat v. Fagg*. 5 B. and A. 343.

In the case of a partnership, the acts of each partner in the name of the firm, and for partnership purposes, are binding upon all the partners; but the transaction must be *bonà fide*, and free from fraud, and not transacting by one partner, for his individual benefit, behind the backs of his co-partners. For, where an agreement was entered into with a banker by one partner, for his sole benefit, without the knowledge of his co-partners, to take the banker’s private parcels free of expense, and, in pursuance of this arrangement, banking parcels had been sent for two years; in an action for the value of a parcel containing bills and notes to a considerable value, which was received in the usual way, and subsequently lost, the court held, that the other partners were not liable. *Bignold v. Waterhouse*, 1 M. and S. 255.

Obligation to  
carry safely.

The responsibility required of a carrier with reference to the care of goods with which he is entrusted with the carriage, rests upon two foundations; the particular nature of his contract, and the obligations superadded by law upon principles of public policy. A carrier, like every other bailee, may stipulate to sustain any degree of risk, or perform services however burthen-some, and he will be bound to perform, to the extent of his contract, the engagements into which he has entered. But where no specific agreement is entered into, the acceptance of a reward would render him responsible only for ordinary negligence. See ante, p. 103f. As this degree of responsibility, however, would not be sufficient to protect the public interests from the

in truth part of the rule itself, and that the responsibility for a loss by *robbers* is only an exception to it; a car-

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fraud of a class of persons who are not entitled to extraordinary confidence, and are exposed to great temptations to be fraudulent with little chance of discovery, the common law, to prevent collusion between carriers and robbers, considerably enlarged their liability, even in some cases beyond what those principles would appear to warrant. See 1 T. R. 32. By the custom of the realm a carrier is responsible for events which are independent of his contract, and is liable for all losses, whether arising from accident, robbery, irresistible force, or any other means whatever, except they arise from the act of God, or of the King's enemies. "By the nature of his contract, as observed by [ 104b. ]

"Lord Mansfield, C. J. in *Forward v. Pittard*, 1 T. R. 33. a carrier is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is, by the common law; a carrier is in the nature of an insurer. It is laid down that he is liable for every accident, except by the act of God, or the King's enemies. Now, what is the act of God? I consider it to mean something in opposition to the act of man: for every thing is the act of God that happens by his permission; every thing, by his knowledge. But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows it was done by the King's enemies, or by such act as could not happen by the intervention of man; as storms, lightning, and tempests. If an armed force come to rob the carrier of the goods, he is liable; and a reason is given in the books, which is a bad one, viz. that he ought to have sufficient force to repel it; but that would be impossible in some cases, as for instance in the riots in the year 1780. The true reason is, for fear it may give room for collusion, that the master may contrive to be robbed on purpose, and share the spoil." See *Proprietors of Trent Navigation v. Wood*, 3 Esp. N. P. C. 231. *Abbott on Shipping*, 231, 4th ed. Dale

rier is *regularly* answerable for neglect, but not, *regularly*, for damage occasioned by the attacks of *ruffians*, any

[ 104c. ]

v. Hall, 1 Wils. 281, supra. p. 104a. But it will be no excuse for a carrier that the loss arose from the act of God, or of the King's enemies, if it were occasioned by his negligence. As where the plaintiff put goods on board the defendant's hoy, who was a common carrier : coming through a bridge, by a sudden gust of wind the hoy sunk, and the goods were spoiled. Pratt, C. J. held the defendant not answerable, the damage being occasioned by the act of God ; for, though the defendant ought not to have ventured to shoot the bridge, if the general bent of the weather had been tempestuous, yet this being only a sudden gust of wind, varied the case. The plaintiff's counsel having offered some evidence, that if the hoy had been in better condition it would not have sunk. The Chief Justice said, that a carrier was not obliged to have a new carriage for every journey ; it was sufficient, if he provided one which, without any extraordinary accident such as this was, would probably perform the journey. *Amies v. Stevens*, 1 Str. 128.

[Where a vessel was beating up the Hudson, against a light and variable wind, and being near shore, and while changing her tack the wind suddenly failed, in consequence of which she ran aground and sunk. It was held that this sudden failure of the wind was the act of God, and excused the master, there being no negligence on his part. *Colt and Colt v. McMecken*, 6 Johns. Rep. 160.

If a loss happens, the onus probandi lies on the carrier to exempt him from the liability : and it is not enough for him to prove, where the goods are carried by water, that the navigation is attended with so much danger that a loss may happen notwithstanding the utmost endeavours of the watermen and crew to prevent it ; that the person conducting the boat possesses competent skill and due diligence, and provided hands of sufficient strength and experience to assist him. *Murphy, Brown & Co. v. Slaton*, 3 Munf. Rep. 239. and see *Bell v. Reed*, 4 Bin. Rep. 127. 6 Johns. Rep. 160.



more than for *hostile* violence or unavoidable *misfortune* ; but the great maxims of policy and good govern-

But where the master of a skipper, who had undertaken to carry a parcel of cotton, his own vessel being full, with the concurrence of plaintiff's overseer has it put on board of another vessel, but gave a receipt himself ; that vessel became stranded, and the cotton damaged, but the vessel being proven good and sufficiently manned, the carrier who undertook was held not liable for the loss. *Bariwell v. Hussy*, 1 Cons. Rep. S. C. 114.

Where goods are damaged on board of a vessel in the voyage, and alleged to be through the default of the master, it is not absolutely necessary that the damaged goods should be sold in order to give a right of action ; and far less, that both the damaged and the sound should be sold. The plaintiff, if he have a right to recover at all, may prove his damages in any other competent manner. *Shackleford v. Patrick*, 1 Cons. Rep. S. C. 311. Whether there be negligence or not is a question of fact for the jury to decide. *Elliot and Stewart v. Russell and Lewis*, 10 Johns. Rep. 1. *Colt and Colt v. McMecken*, 6 Johns. Rep. 160.

Where the owners of a vessel undertook to carry goods for hire, from one port to another, and during the passage the river became obstructed with ice, it was held that they were liable as common carriers for the damage sustained. *Richards v. Gilbert*, 5 Day Rep. 415.

If the vessel of a common carrier strike on a rock not generally known, and the master did not actually know it, and if he conducted himself properly, and no fault was imputable to him, he would not be liable : *Secus*, if the loss be imputable to negligence, as if the master be ignorant of the navigation of the river, and have no pilot on board. *Williams v. Grant*, 1 Conn. Rep. 487.

A carrier's vessel must be sea-worthy, or he must answer, although the loss does not proceed from sea-worthiness. *Bell v. Reed*, 4 Bp. Rep. 127.]

If goods are delivered to a carrier for the purpose of carriage, and he is robbed of them, he will be answerable for

ment make it necessary to *except* from this rule the case of *robbery*, lest confederacies should be formed between

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their value, because, having his hire, there is an implied undertaking for their safe delivery. *Woodleife v. Curteis*, 1 Roll. Abr. 2. (C) pl. 4. 1 Inst. 89 a.; but see ante, 103f. for the true ground of this responsibility.

[Where a master of a vessel employed in the transportation of goods between New-York and Albany, carried some flour to New-York, for the ordinary freight, and having sold it in New-York for cash, was robbed of the money; it was held that the owners of the vessel were liable for the amount, though no compensation beyond the freight was allowed for the sale of the goods and bringing back the money; such being the duty of the master in the usual course of the employment, where no special instructions were given. *Kemp v. Coughtry*, 11 Johns. Rep. 107.]

In the same manner, he is responsible for an injury resulting from irresistible force; for though the force be never so great, as if an irresistible number of persons should rob him, he is nevertheless chargeable. Per Holt, C. J. in *Coggs v. Bernard*, 1 Lord Raym. 919. So, the carrier is responsible for inevitable accident, as in the above case of *Forward v. Pittard*, 1 T. R. 25. where the goods were destroyed by an accidental fire, communicating to the booth in which the goods were deposited for a temporary purpose, in the course of the journey; and where it was expressly found that they were consumed without any negligence in the carrier, and that the fire was not occasioned by lightning. See *Hyde v. the Navigation Company from the Trent to the Mersey*, 5 T. R. 389. So, where the Proprietors of the Trent Navigation Company undertook to carry goods from Hull to Gainsborough, and the vessel on board of which the goods were, sunk in the river Humber, by driving against an anchor in the river, and the goods were in consequence considerably damaged, the carrier was holden responsible for the loss, notwithstanding it was objected, that the accident was occasioned by the negligence of persons on board a barge in the river, in not having

carriers and desperate villains with little or no chance of detection.

their buoy out, to mark the place where the anchor lay. The court observed, that there was a degree of negligence in the carrier, for his not seeing the buoy ought to have put him upon inquiring more minutely about the anchor ; and even if there had not been any actual negligence on the part of the carrier, yet that negligence, in point of law, was sufficient without any other cause. *Proprietors of the Trent Navigation v. Wood*, 3 Esp. N. P. C. 127. [ 104d. ]

From this responsibility the adoption of additional means to insure safety will not exonerate the carrier, where the goods are in his custody in that character. If, therefore, goods of great value are delivered to a common hoyman, and the owner afterwards delivers them to another person in the boat to keep safely, but does not discharge the hoyman, and they are afterwards lost through negligence, an action lies against the hoyman. Roll. Abr. 2. (C) pl. 3. So, if a man travel in a stage coach and take his portmanteau with him ; though he has his eye on the portmanteau, yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost. Per Chambre, J. in *Robinson v. Dunmore*, 2 Bos. and Pul. 419.

The injury, however, must happen whilst the goods are in the carrier's custody as a common carrier, for where a carrier by water had reached the place of his destination, and the goods were deposited in a warehouse belonging to him, but without any distinct charge being made on that account, for the convenience of the owner, and until they could be forwarded by another conveyance ; the carrier's duty, as such, was holden to have terminated, and that he was not liable for the loss of the goods, which arose from their being destroyed by an accidental fire while they were in the carrier's warehouse. *Garside v. The Proprietors of the Trent and Mersey Navigation*, 4 T. R. 581. See ante, 96a. n. (7). So, in an action by the East India Company against a lighterman on an undertaking to carry goods for hire, for not safely conveying them from a ship in the

Although the *act of God*, which the ancients too called *casus Dei* and *vin divinum*, be an expression, which

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[ 104e. ] river Thames to the Company's warehouses, by which they were lost. It appeared that upon the unshipping of the goods, the Company had, as was their custom, put an officer called a guardian on board the lighter, who, as soon as the lading was complete, put the Company's locks on the hatches, and accompanied the goods to see them safely delivered. Raymond, C. J. was of opinion, that this differed from the common case, this not being any trust in the defendant, and the goods were not to be considered as ever having been in his possession, but in the possession of the Company's servant who had hired the lighter to use himself; he thought, therefore, that the action was not maintainable, and the plaintiffs were non-suited. *East India Company v. Pullen*, Str. 690. In commenting upon this case, in *Robinson v. Dunmore*, 2 Bos. and Pul. 419. *Chambre, J.* observed, that this decision proceeded on the usage of the East India Company, who never intrust the lightermen with their goods, but give the whole charge of the property to the officer called the guardian.

But since it is the duty of a carrier to deliver goods to the houses of persons to whom they are directed, where it is the usage of his trade to do so, they will be considered in his custody as a common carrier, and he will, therefore, be liable as such, until they are so delivered. The defendants, who were common carriers from Gainsborough to Manchester, received a quantity of goods to be conveyed from the former place along their Navigation and the Duke of Bridgewater's canal to Manchester, where they were lodged in the Duke of Bridgewater's warehouse, and there consumed by an accidental fire the same night. Distinct charges were made for the carriage of the goods along different parts of the navigation; for warehouse room for the Duke of Bridgewater, which they received as his agent, and without any share of the profit; and also for cartage from the Duke of Bridgewater's warehouse to the plaintiff's warehouse at Manchester. The defendants had for-

long habit has rendered familiar to us, yet perhaps, on that very account, it might be more proper, as well as

merly delivered the goods in their own cart, but had latterly given up that business, and the profits to be derived from it to their book-keeper, which was known to the plaintiffs. The goods having been lost, the defendants were holden liable, since they had received the goods in the capacity of carriers, and as their engagement was to carry and deliver them, the goods remained in their custody, as carriers, the whole time, which was not affected by the arrangement made by them with their book-keeper. The charge for wharfage and cartage in the defendant's bill, which they compelled the plaintiffs to pay before they would engage to deliver the goods, were considered as decisive to show that in this case the liability of the defendant continued until the goods were delivered. *Hyde v. The Navigation Company from the Trent to the Mersey*, 5 T. R. 389.

[ 104f. ]

[Where goods were put on board the vessel of the defendant to be carried to Albany, and on arriving there, were by the defendant's direction put on the wharf, it was held that this was not a delivery to the consignee, although the goods were taken away (without the direction of the consignee) by a carter usually employed to transport his goods, and the greater part actually received by the consignee; and the defendant was held liable in trover for the goods not actually delivered. *Oxtrander v. Brown*, 15 Johns. Rep. 39.]

The unlimited responsibility imposed upon a carrier, except in the two instances before mentioned, might in many cases prove oppressive, unless he were allowed to protect himself by particular stipulations. An indulgence was, therefore, formerly allowed of qualifying this general liability by reasonable limitations, not inconsistent with his common law obligation, and a carrier might, where he had just grounds for doing so, decline altogether to take charge of goods; or if he consented to accept them, he might protect himself by the special terms upon which he agreed to receive them. *Morse v. Slue*, 1 Vent. 238. *Bodenham v. Bennett*, 4 Price, 34. Terms of this de-

General notice.

more decent, to substitute in its place *inevitable accident*; religion and reason, which can never be at variance

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scription are of ancient date. See 3 Taun. 271.; and the receipt of goods upon such conditions was considered as a special acceptance, and was usually made in each particular case. But in recent times a mode has arisen of effecting the same object by means of a general notice, intimating to the public the terms upon which the carrier consents to take charge of goods; and if the notice is brought home to the knowledge of the employer, it will be considered as equivalent to a special acceptance. The importance of these notices, and the numerous questions to which they give rise, will perhaps excuse an examination into their nature and the protection they afford.

The qualification engrafted by a special acceptance, upon the carrier's obligation to carry goods, must in all cases be of a reasonable nature, and not calculated to destroy the duty imposed by the common law; and the same principle applies to the case of a notice. By a general notice, a carrier generally refuses to be liable for articles above a small sum, unless entered, and an additional premium paid in proportion to the value of the article; and in this respect there is nothing unreasonable, for the carrier is not only to be paid for his labour, but also for the risk he incurs. His charge, however, must in all cases be reasonable, for he is bound to carry goods which are brought to him, and cannot defeat this obligation by making an excessive demand. *Harris v. Packwood*, 3 Taun. 272. *Batson v. Donovan*, 4 Barn. and Ald. 39. *Hyde v. the Proprietors of the Trent and Mersey Navigation*, 1 Esp. N. P. C. 36. But he may not only limit his responsibility in this respect, but may in some cases exclude it altogether, as by refusing all responsibility from accident arising by fire. *Maving v. Todd*, 1 Stark. N. P. C. 72. and in general he will not be liable for losses arising from accident, or for theft, or robbery, when no collusion can be established on the part of the carrier; or for any want of care, unless amounting to gross negligence, or a tortious misfeasance of the property.

[ 104g. ]

without certain injury to one of them, assure us, that  
 “not a gust of wind blows, nor a flash of lightning

By these means, the wholesome provisions of the common law have not only been defeated, but the effect of these notices has been to render a carrier responsible for a less degree of care than that which is exacted from a pawnee, or any other bailee who has a reward. A warehouseman, depository of goods for hire, or other bailee of a similar description, are responsible for the want of ordinary care; but a common carrier, although he receives a reward, is not liable for ordinary negligence; for although it is said a general notice does not exempt him from the exercise of due and ordinary care, yet the question left to the jury in such cases is, whether he has been guilty of gross negligence. See *Batson v. Donovan*, 4 Barn. and Ald. 21. and the cases *infra*.

For these reasons, the legality of these notices and the policy of adopting them, have been frequently questioned, and their introduction has been lamented by many eminent and learned persons. See *Down v. Fremont*, 4 Camp. 41. *Smith v. Horne*, 8 Taun. 146.; but they are now established to be legal, and are daily received and acted upon in courts of justice. In the case of *Nicholson v. Willan*, 5 East, 507. an objection to their validity came formally before the court, upon the ground of their inconsistency with the policy of the common law, and that it was the duty of carriers, if the reward was not adequate to the risk, to make a special acceptance of the goods in each case, at a rate proportioned to their value. But it was observed by Lord Ellenborough, C. J., delivering the judgment of the court, “that considering the length of time during which, and the extent and universality in which the practice of making such special acceptances of goods for carriage, by land and water, has now prevailed in this kingdom, under the observation, and with the allowance of courts of justice, and with the sanction also and countenance of the legislature itself, which is known to have rejected a bill brought in for the purpose of narrowing the carrier’s responsibility in certain cases, on the ground

[ 104h. ]

“gleams, without the knowledge and guidance of a superintending mind;” but this doctrine loses its dignity

“of such a measure being unnecessary, in as much as the carriers were deemed fully competent to limit their own responsibility in all cases by special contract: considering also, that there is no case in the books, in which the right of a carrier, thus to limit by special contract his own responsibility, has ever been by express decision denied; we cannot do otherwise than sustain such right in the present instance, however liable to abuse, and productive of inconvenience it may be; leaving to the legislature (if it shall think fit) to apply such remedy hereafter, as the evil may require.” Since this decision, the legality of these notices has been acquiesced in and acted upon, but notwithstanding they are established, the courts discountenancing the doctrine, and restraining it as far as is consistent with the rules of law, require strict proof of the communication of the notice from every carrier, and construe with strictness the terms in which it is framed.

Communication.

The notice must proceed from the carrier; for he is bound to discharge himself from the losses to which he is subject by the general law of the realm, by a notice given by himself; and a general usage of trade is not evidence for that purpose. *Clark v. Gray*, 4 Esp. 178. But a carrier who continues the business of another carrier, is protected by a notice given and signed by the former carrier, limiting his responsibility, and which the new carrier, within the customer's knowledge, keeps hung up in his office. *Evans v. Soule*, 2 M. and S. 1. But as a personal communication is not necessary in order to constitute a special acceptance, since the knowledge of each other's minds, which is the object of a special acceptance, if effected by other means, is sufficient. See *Gibbón v. Paynton*, 4 Burr. 2302. So, it is not requisite that there should be any direct and immediate communication of a general notice; it will be sufficient if the means adopted are such from whence a jury may reasonably infer that a knowledge of its contents was conveyed to the person dealing with the carrier.

[ 104i. ]



and sublimity by a technical application of it, which may in some instances border even upon profaneness ; and

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A direct communication is indeed rarely made : the means usually adopted for this purpose are by the publication of an advertisement in a newspaper, posting a notice in some conspicuous part of the office, or place where the carrier transacts his business, or by the circulation of hand-bills. Where these means are not adopted, or prove ineffectual, other circumstances may exist from whence a knowledge of the notice may be inferred. But whatever the means may be upon which the carrier relies, he must at his peril take care that every one who deals with him is fully apprised of the limits to which he intends to confine his responsibility. *Butler v. Heane*, 2 Camp. 415. *Davis v. Willan*, 2 Stark. 279.

Where the publication is by an advertisement in a newspaper, and there is no direct proof of knowledge, some evidence must be given to raise a reasonable presumption that a party has knowledge of it before such advertisement can be received in evidence. In one case where the notice was inserted in the Gazette, that paper was admitted as evidence, although considered of little avail, without proof that the party was in the habit of reading it. *Leeson v. Holt*, 1 Stark. N. P. C. 186. But in a subsequent case, *Munn v. Baker*, 2 Stark. N. P. C. 256. this evidence was rejected without such proof ; since a party might be expected to look into the Gazette for notices of the dissolution of partnerships, but not for notices by carriers of the limitation of their responsibility. There appears, therefore, to be no distinction in this respect, between a Gazette and any other newspaper. See *Phillips on Evidence*, 323. 3d Ed.

In cases of this description, a habit of reading the paper in which the advertisement is published, although there is no proof that the party has actually read or seen the particular paper in which it is inserted, will be sufficient evidence from whence to infer a knowledge of the notice. *Gibbon v. Paynton*, 4 Bern. 2298.

law, which is merely a practical science, cannot use terms too popular and perspicuous.

Notice affixed  
in offices.

[ 104j. ]

Where the notice is posted in the office or place where the carrier transacts his business, it should be fixed in some conspicuous part in large and legible characters, that persons delivering goods may have ample means of seeing the terms on which the carrier conducts his business, and that they cannot fail to do so without gross negligence. *Butler v. Heane*, 2 Camp. 415. *Clayton v. Hunt*, 3 Camp. 28. But if a bill, which is posted upon the door of the carrier's office where he receives and delivers goods, blazons in large characters the advantages of his conveyance, but states in small characters at the bottom of it the restriction upon his responsibility, it will not be sufficient. *Butler v. Heane*, 2 Camp. 415. So, this mode of communication will be insufficient, where the goods are not delivered at the office, but collected by the carrier's cart sent round to receive goods for the waggon, or received at a distance from the office; in these cases, some other mode of communication must be adopted. *Clayton v. Hunt*, 3 Camp. 27. In the same manner, the notice will be unavailing if it should appear that the person delivering the goods does not in fact read the notice, *Kerr v. Willan*, 2 Stark. N. P. C. 53. whether it happens notwithstanding he is capable of doing so, or from ignorance or inability to read. *Davis v. Willan*, 2 Stark. N. P. C. 279.

Hand-bills.

In the case of publishing the notice by the circulation of hand-bills, the limitation should be framed in clear and distinct terms, and not at variance with any other mode of publication that may be adopted; for a hand-bill, limiting the carrier's responsibility in a less degree than a notice affixed in the office will control the latter, since a person who receives the hand-bill has a right to presume that what is circulated by the carrier's authority, contains the whole of the limitations he intends to put upon his common law responsibility as a common carrier, and gives a full statement of the special contract into which he enters with his customers. *Cobden v. Bolton*, 2 Camp. 108.

In a recent case of an action against a carrier, it was holden to be no excuse, "that the ship was tight when

If none of these means are adopted, or if they prove ineffective, other circumstances may be sufficient from whence a jury may infer the required knowledge. Thus, notice to the vendor of goods that the carrier by whom he sends them limits his responsibility, is equivalent to notice to the vendee who directs them to be sent, for he is bound by the acts of the vendor and his agents in this respect. *Maving v. Todd*, 1 Stark. 72. See [ 105 ] *Clarke v. Hutchins*, 14 East, 475. So, an acquiescence in the loss of parcels sent by a carrier who had published a general notice, and a direction to the person sending the parcels to insure them for the future, would be evidence to show a knowledge of the notice. *Roskell v. Waterhouse*, 2 Stark. N. P. C. 462. Particular circumstances.

In cases in which a carrier is protected by a general notice, Waiver. he must be cautious not to do any act by which the notice may be waived ; for if so, he will lose the benefit to which he would otherwise be entitled. *Evans v. Soule*, 2 M. and S. 1. Thus, a carrier who had given notice that he would not be accountable for goods of a particular description, above the value of 5*l*, unless specified, and paid for as such when delivered, is nevertheless liable for damage done to an article coming within that description, although the terms of the notice were not complied with, the book-keeper having been informed of its value, and desired to charge for it what he pleased, which should be paid provided it was taken care of. Lord Ellenborough, C. J. decided, that under these circumstances, the payment of the money was dispensed with, and the notice unavailing. *Wilson v. Freeman*, 3 Camp. 527. But a carrier, entitled to the benefit of his notice does not waive it altogether, by paying for goods lost or damaged, without inquiring whether it was occasioned by the negligence of his servants ; this is but carelessly settling his accounts ; he may waive a right, *pro hac vice*, without abandoning it altogether. *Evans v. Soule*, 2 M. and S. 1.

“the goods were placed on board, but that a rat, by gnawing out the oakum, had made a small hole,

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The mere knowledge, however, that the article is above the stipulated value, will not have this effect. A notice, that a carrier would not be answerable for any goods of what nature or kind soever, above a certain value, unless the terms of the notice were complied with, was considered not to apply to a case where the carrier was perfectly aware that the goods, in this instance a cask of brandy, were above the stipulated sum, or where the goods, being of large bulk and known quality, must be obviously above that sum. *Beck v. Evans*, 16 East, 244. 3 Camp. 267. S. C. And in another case, where the known value of the goods was relied upon in answer to a notice set up by the carrier, Lord Ellenborough, C. J. observed, that the appearance of the goods must necessarily indicate that they are above the stipulated value, in order to deprive the carrier of the benefit of his notice. *Down v. Fromont*, 4 Camp. 40. But in a subsequent case, where a parcel, containing a quantity of guineas, was delivered to the book-keeper of a mail-coach office, to be forwarded to London, who was aware of its contents, and for greater security deposited it in the banker's bag, notwithstanding which it was lost; it was decided by Gibbs, C. J. that the mere knowledge that the value of the parcel exceeded the sum for which the carrier would be answerable, unless they were duly entered and paid for accordingly, did not deprive the carrier of the benefit of his notice. *Levy v. Waterhouse*, Selw. N. P. 388. 4th ed. 1 Price, 280. S. C.

Where a notice requiring an additional premium, according to the value of the article, is not complied with, it would appear that the owner, by declining to pay the enhanced premium, takes upon himself the risk against which that payment would secure him, and cannot look to the carrier, to sustain it; and accordingly the doctrine contained in the latter case is that which now prevails. The only effect of knowledge in such a case would be to render the carrier responsible for a degree of care proportionate to the nature and value of the article.

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“ through which the water had gushed ;”(b) but the true

(b) 1 Wils. part 1. 281. Dale and Hall.

If the notice has been fully communicated, and not waved by any act on the part of the carrier, he will be entitled to set it up as a limitation upon his responsibility. The extent of the protection afforded by it will depend upon the language in which it is framed ; yet as no general form is adopted, a separate one being usually given by each carrier, no general rule can be laid down upon the subject. But the language of the notice, and the terms of limitation imposed by it, should be clear and unambiguous, and free from all artifice or attempt to deceive ; for, if the words are doubtful, they will be construed against the carrier, and any artifice will render it unavailing. See *Butler v. Heane*, 2 Camp. 415.

Notice, its form and construction.

There should also be no doubt or contradiction arising as to the extent of the limitation intended to be imposed ; for where different notices are published, which are inconsistent in their terms, the carrier will be bound by that which is least beneficial to himself, as where a notice is circulated by hand-bills, and also affixed in the office ; but the limitation imposed by the latter is more extensive than the former, he will be bound by the notice contained in the hand-bill. *Cobden v. Bolton*, 2 Camp. 108. So, where a notice was given to the person delivering the goods, which contained a restriction upon the defendant's liability in a less degree than a notice put up in his office, he was holden to be bound by the former. *Mum v. Baker*, 2 Stark. N. P. C. 256.

[ 105a. ]

A few instances will explain the manner in which they have been received and interpreted by the court.

In a case in which the terms of the notice were, “ that cash, “ plate, jewels, writings, or any such kind of valuable articles, “ would not be accounted for, if lost, of more than 5*l.* value, “ unless entered as such, and a penny insurance paid for each “ pound value,” the court were of opinion, that the sense of the printed conditions seemed to be, that the defendants were not liable to any extent, unless the parcel had been entered and

reason of this decision is not mentioned by the reporter ;

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paid for as valuable, and the plaintiff accordingly did not recover any thing. *Clay v. Willan*, 1 Hen. Black. 298. See a similar notice in the cases of *Nicholson v. Willan*, 5 East, 507. *Harris v. Packwood*, 3 Taun. 264. where the plaintiffs, not having complied with its terms, were not allowed to recover to any extent. So, wheret he notice was in these words : " Take notice, " that the proprietors, &c, at this office, will not be accountable " &c, for any goods or package whatever, if lost or damaged, " above the value of five pounds, unless insured and paid, &c." the court said, " They could not help giving effect to those " terms in the notice, by which, inasmuch as the goods in ques- " tion were above the value of 5*l.* and not insured, or paid for " at the time of delivery, the defendants could not be held ac- " countable at all." *Izett v. Mountain*, 4 East, R. 371. But, since a person cannot stipulate against the consequences of his own fraud, *Doctor and Stud.* 278. 'Dial. 2 c. 38. *Noy's Max.* 92. ante, 47, a general notice, in whatever language it may be framed, will not protect the carrier from any want of care which amounts to gross negligence, or from any tortious misfeasance, with reference to the goods, or other circumstances which may be considered as evidence of fraud. " These special conditions " were introduced for the purpose of protecting carriers from " extraordinary events, but were not made to exempt them from " due and ordinary care." Per Wood, B. in *Bodenham v. Bennett*, 4 Price, 34.

[ 105b. ]

In the same manner, since a carrier is responsible for the acts of his servant, in those things which respect his duty under him, if the misconduct from which the loss arises proceeds from the servant, the carrier will be equally liable, notwithstanding a general notice, for it will not protect him from a responsibility for losses arising from his misconduct. *Ellis v. Turner*, 8 T. R. 831. *Garnett v. Willan*, 5 B. and A. 57. The terms, " lost or damaged," which are usually found in the notice, are not to be construed in their largest sense, but to be understood with

it was, in fact, *at least ordinary negligence*, to let a rat do

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this qualification ; " the carrier himself doing nothing by his " own voluntary act, or the act of his servants, to divest himself " of the charge of carrying the goods to the ultimate place of " destination." Per Bailey, J. in *Garnett v. Willan*, 5 Barn. and Ald. 57.

The following cases will show the degree of care required from a carrier, notwithstanding a general notice, and the particular circumstances which have been decided to constitute such gross negligence as to deprive the carrier of the benefit of his notice.

A notice by several lighterman in these words, " We, &c. will " not be answerable for any loss or damage which shall happen " to any cargo which shall be put on board any of our vessels, " unless such loss or damage shall happen, or be occasioned by " want of ordinary care and diligence in the master or crew of " the vessel ; in which case we will pay 10*l.* per cent. upon " such loss or damage, so as the whole amount of such payment " shall not exceed the value of the vessel and the freight ; " was construed not to extend to protect the carrier from a loss happening by his personal default, the not providing a sufficient vessel, but to limit his responsibility in those cases only where the law would otherwise have made him answer for the neglect of others, and for accidents which it might not be within the scope of ordinary care and caution to provide against. *Lyon v. Mills*, 5 East, 439. So, where a notice was given, similar to the one in the last case, by the defendant, who was the owner of a vessel trading from Hull to Gainsborough, and had taken on board some goods belonging to the plaintiffs, which were to be delivered at Stockwith ; the vessel went safe as far as Stockwith, and there delivered part of the cargo, but the master of the vessel finding it inconvenient to deliver the rest there, proceeded on her voyage, and sunk before her arrival at Gainsborough. In an action for the value of the goods, the defendant was holden responsible for the loss thus occasioned by the misconduct of his servants. *Ellis v. Turner*, 8 T. R. 531.

[ 105c. ]

such mischief in the vessel ; and the *Roman* law has, on this principle decided, that “ *si fullo vestimenta polienda*

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In the same manner, where a cask of brandy properly packed, was delivered to the defendant, to be carried from Shrewsbury to London, which in the course of the journey began to leak considerably, within the waggoner's knowledge : he, however, proceeded on to Birmingham, where he staid three hours, but took no steps to stop the leakage ; but proceeding on to Wolverhampton, the next stage, where he also made some stay, he there also neglected to do so, although it was increasing ; however, at the next stage, having some parcels to deliver, he then took out the cask, and the remainder of the brandy was saved. The defendant was held liable for the loss, notwithstanding he had circulated a general notice, known to the plaintiff, but not complied with, that he would not be liable for cash, bank-notes, jewels, and other valuable articles, or any other goods, of what nature or kind soever, above the value of 5*l*. if lost or damaged, unless there was a special agreement, and an additional premium paid, upon the ground, that he did not stipulate for exemption from the consequences of his own misfeasance ; and if goods are confided to him, and it is proved that he has misconducted himself, in not performing a duty which by his servant he was bound to perform, that is such a misfeasance, from which, if the goods thereby become damaged, his notice will not protect him. *Beck v. Evans*, 16 East, 247. In *Garnett v. Willan*, 5 B. and A. 61 Mr. Justice Holroyd, commenting upon this case, observed, that the defendant was held liable on the ground that the loss accrued from the gross negligence of defendant's servant. So, where a banker's parcel was delivered to the driver of the defendant's coach, which ran from Hereford to Brecon, and thence to Carmarthen, directed to the plaintiff's correspondent at Brecon, the book-keeper who received the parcel was aware that it contained bank-notes, and the plaintiff also knew that the defendant was not liable for losses beyond 5*l*. unless an extra charge was paid, which was not done in the present instance. The parcel

[ 105d. ]



"*acceperit eaque mures roserint, ex locato tenetur, quia debuit ab hac re cavere.*"(c).

(c) D. 19. 2. 13. 6.

having been lost, in an action to recover the value, it appeared that the parcel was regularly entered in the way-bill, and put in the back seat of the coach; but, upon the arrival of the coach at Brecon, the book-keeper at that place took out the other parcels, but neither looked for, nor made any inquiry about the parcel in question, trusting, as he said, to the coachman, who on that day was intoxicated, though not so much as to incapacitate him entirely from attending to his duty. The plaintiff obtained a verdict, which the court refused to set aside, upon the ground that there was gross negligence in the carrier, from which his notice would not protect him. *Bodenham v. Bennett*, 4 Price, 31. Vide *Levi v. Waterhouse*, 1 Price, 280. *Birkett v. Williams*, 2 Barn. and Ald. 356. So, in a case in which a parcel was lost in the course of delivery, where it appeared to be usual for carriers to send two persons with the cart employed for that purpose, and that the defendant in general sent two, but in this instance sent only one, during whose absence, in delivering other parcels, the one in question was stolen; the jury having found, that this was gross negligence in the defendant, the court coincided in that opinion, and the defendant was deprived of the benefit of the notice, to which he would otherwise have been entitled. *Smith v. Horne*, 8 Taun. 144.

In an action, however, against the proprietors of a stage-coach for the loss of a parcel containing 100*l.* it appeared, that the coachman had given notice that he would not be answerable for money or jewels, or other valuable articles, unless he had notice of the valuable articles delivered to him, and that the plaintiff had knowledge of the notice, but had not given the required information. The money was sent, hidden in hay, in an old bag, and was delivered to the defendant's book-keeper as an ordinary parcel, without any mention being made of the

[ 105e. ]

Whatever doubt there may be among civilians and common-lawyers in regard to a *casket*, the contents of

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nature of its contents. The defendant was holden not to be liable for the value of the parcel, by reason of the fraud practised upon him in the concealment of its contents, with full knowledge that the defendant had refused to be responsible for such parcels without such information. *Gibbon v. Paynton*, 4 Burr. 2298. See *Batson v. Donovan*, *infra*. So, where the plaintiffs, who were bankers at Berwick and Newcastle, delivered a box containing bills, cheques, and notes, of the value of 4072*l.* to the defendants, who were the owners of a coach travelling through Berwick to Newcastle, and had given notice that they would not be answerable for parcels of value, unless they were entered and paid for as such; the box was delivered to the defendants directed to the plaintiffs at Newcastle, with only this observation, "It is the box for Newcastle," and although the plaintiffs knew of the notice, no additional premium was paid, nor was any thing said as to its contents, nor did it appear that the defendants knew that it contained articles of value. The coach arrived at Berwick at twelve at night, and during its stay there, which was about half an hour, it stood in the middle of the street, about thirty yards from the pavement. About a quarter of an hour after the arrival of the coach, the box was placed in the boot of the coach, and a porter placed to watch it, but, notwithstanding, the parcel was stolen from the boot, whilst he was so stationed. Under these circumstances, the jury having found that the plaintiffs had not dealt fairly with the defendants, in not disclosing to them that the box contained articles of value, and that the defendants were not guilty of gross negligence, the court afterwards concurred in that opinion, and refused to grant a new trial. *Batson v. Donovan*, 4 Barn. and Ald. 21. *ante*, p. 104.

A general notice will also afford no protection to a carrier, where the loss arises from a misfeasance, as in the misdelivery of goods, whether committed by him or his servants.

A counterfeited order for a quantity of cochineal having been

*which are concealed from the DEPOSITARY, (d) it seems to be generally understood, that a common carrier is*

(d) Before, p. 37, 38, 39.

sent to the plaintiffs by a letter signed in the name of "J. Worthy," and dated Exeter, they having had previous dealings [ 105f. ] with a person at that place of the name of Jonathan Worthy, accordingly executed the order, and delivered a box containing the article in question to the book-keeper at the defendant's office. The coach reached Exeter on Saturday, and on that evening a person inquired if such a box had arrived, and was told that parcels were not sent out on Sunday, but that it might be had by being sent for. On Sunday night a labouring man called at the coach-office, and asked for Mr. Worthy's box, and upon being asked by whom he was sent, he replied, he did not know the person, but it was a man in the street. The book-keeper observing he had two packages for Mr. Worthy, the one a box, and the other a small parcel, the man replied, that he had money to pay only for the box, but that he would ask the person who sent him, for money for the other. He went out for that purpose, and on his return declined taking any thing but the box, which was accordingly delivered to him. The defendants proved that a public notice not to be liable for packages of this description, without an additional premium, was affixed in their office; but the porter who carried the parcel to the office, swore, that he did not see the notice, and it was not proved that the plaintiff himself had any knowledge of the contents of such notice. The defendants, however, having obtained a verdict, a new trial was granted, upon the ground of a misdirection upon the question of gross negligence. *Birkett v. Willan*, 2 Barn. and Ald. 356. And *Bailey, J.* in commenting upon this case in *Garnett v. Willan*, 5 B. and A. 58. observed, that the carrier, by the wrongful act of his servant, had divested himself of the charge of carrying the parcel to its ultimate place of destination; for it was his duty to carry it to the house of the person for whom it was intended at Exeter,

answerable for the loss of a box or parcel, be he ever so ignorant of its contents, or be those contents ever so

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[ 105g. ] if he found the person for whom it was directed, or to keep it in order to make due inquiry to find him out. And that the court were of opinion, that this being a case of gross negligence, was a loss not protected by the terms "lost or damaged," inserted in the notice. So, where the plaintiffs sent a parcel containing a quantity of silks, and other articles, by the defendant's waggon, directed to "Mr. James Parker, of High-street, Oxford;" and, on the morning after the arrival of the waggon, the defendant's porter, upon application to that person, found that the parcel was not for him. Shortly afterwards, a person of the name of Parker, of whom there were several resident in Oxford, though none in the High-street, of the above Christian name, and to whom goods had before been delivered when directed to Mr. Parker, Oxford, to be left till called for, came to the defendant's office, and seeing the parcel directed as before mentioned, he claimed it as his own, and, on paying for the carriage, the parcel was delivered to him. The defendant had given a general notice, not to be liable for parcels similar to the one in question, unless specified when delivered at the office, with which the plaintiffs had not complied. In an action to recover the value of the goods, the court held, that as the parcel was directed to a particular house, to which the defendant was bound, by the ordinary course of his trade, to deliver it, the delivery to a person whose residence was unknown, after it had been refused by the person to whom it was directed, amounted to gross negligence in the defendant, for which he was responsible, notwithstanding his general notice. *Duff v. Budd, 3 Bro. and Bing. 177.*

A carrier, like every other person who enters into a contract, is bound to perform his engagements in the mode and to the extent for which he has contracted; and consequently, where a carrier has undertaken the conveyance of goods, he cannot relieve himself from his responsibility by transferring them to another carrier, or by sending them by a different conveyance

valuable, *unless* he make a *special* acceptance :(e) but

(e) 1 Stra. 145, Titchburn and White.

from that in which he undertook to carry them. If his engagements are violated in either of these respects, and the goods are in consequence lost, he will be responsible notwithstanding he may be in other respects entitled to the benefit of a general notice.

The plaintiffs, resident at Worcester, having written to their correspondent at London, to send them a quantity of goods "by the return of mail," a parcel containing them was accordingly delivered at the coach-office, whence the Worcester mail-coach proceeded, and booked "as for the Worcester mail-coach to Worcester," of which coach the defendants were the proprietors. The parcel was accordingly put into that coach, and entered in the usual way-bill as a parcel to be carried from London to Worcester, and actually carried from the inn whence the coach started, to an inn in Oxford-street, at which the defendants had no office or servant, but where passengers and parcels were booked for their coach. At this place the parcel was taken out of the mail-coach, and there left to be forwarded on the following day by another Worcester coach, in which one of the defendants had no interest, and from which the parcel was lost, but by what means did not appear. The defendants had given a general notice, which was known to the plaintiffs, not to be liable for the loss or damage of goods of the value of those in question, without an additional premium beyond the common carriage price, but which was not done. Under these circumstances, the defendants were holden responsible for the loss, on the ground that the delivery and acceptance of the parcel on the part of the defendants, entitled the plaintiffs according to their contract, not merely to the care and diligence of one, but of both of the defendants; and that as they had, by the act of their servant, wrongfully divested themselves of the charge of carrying the parcel to its ultimate place of destination, they were not protected by their notice. *Garnett v. Willan*, 5 B.

[ 105h. ]

*gross fraud and imposition* by the bailor will deprive him

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and A. 53. So, where a banker's parcel of considerable value was delivered to the defendants, addressed to the plaintiff's clerk, with the direction, "R. Angier, Christ-church, Hants, "per mail," and entered by the defendants' book-keeper, to go by the mail of which they were the proprietors; but, instead of sending it by this conveyance, the defendants sent it by the Southampton light coach, the proprietors of which were different from those to whom the mail belonged, and by which the risk of the conveyance was increased. The parcel having been lost, the defendants, upon the principle of the former case of *Garnett v. Willan*, were holden responsible for the value, notwithstanding a general notice, to which they would otherwise have been entitled, not merely as a case of negligence in the performance of their contract, but of a refusal altogether to perform it, in receiving the parcel to be conveyed by one coach, and sending it by another, of which all the same persons were

[ 105i. ] not proprietors. *Sleat v. Fagg*, 5 B. and A. 342. But where the defendants were the owners of two coaches, a mail and a heavy coach, travelling to the same place, and a parcel was delivered and accepted for the purpose of being sent by the mail, but by an entry in the defendants' book, it appeared to have been booked for the heavy coach, but no evidence was given that it was put into or carried by either coach, or in what manner the parcel was lost, whether in the warehouse, or in the course of its conveyance, the defendants were holden not to be deprived of the benefit of their general notice. On the part of the plaintiffs it was contended, that the defendants were liable for the value of the parcel, notwithstanding a notice had not been complied with, on the ground that the loss had not been incurred in the course of their employment as carriers, but occasioned by an act of tortious conversion in direct contravention of the terms on which the goods were delivered to and accepted by them. But it was observed by Lord Ellenborough, C. J., delivering the judgment of the court, "that to found this argument, there was no other evidence but the mere fact of book-

of his action, and if there be proof that the parties were

“ing the goods for a different coach, and a subsequent non-delivery, which can amount to no more than a negligent discharge of duty in their character of carriers, and not to an entire renunciation of that character, and of the duties attached to it, so as to make them guilty of a distinct tortious misfeasance in respect to the goods in question.” *Nicholson v. Willan*, 5 East, 506. See *Garnett v. Willan*, 5 Barn. and Ald. 59.

The duty of a carrier with respect to the delivery of goods at the houses of the persons to whom they are directed, is not established with the same precision as the duties which have been before enumerated. Where it is the general course of his trade to deliver goods in this manner, he will be bound to do so, for by the receipt of them, he will be understood to have contracted for their conveyance on the same terms, and in the same manner in which he usually transacts his business with respect to other persons. *Golden v. Manning*, 3 Wils. 429., 2 Blk. 916. *S. C. Hyde v. The Trent and Mersey Navigation Company*, 5 T. R. 396. But where no such usage exists, it has not been judicially determined that by the common law the carrier is bound to perform this duty, although there are various dicta which incline to support that proposition. In the case of *Hyde v. The Trent and Mersey Navigation Company*, 5 T. R. 396., where the general question was agitated, Ashhurst, Buller, and Grose, J. were of opinion that the carrier was so bound; but Lord Kenyon, C. J. observed, that the leaning of his mind then was that the carrier was not liable to that extent. In a more recent case, it was also observed, that a carrier does not only engage safely to carry goods, but also to deliver them. Per Wood, B. in *Bodenham v. Bennett*, 4 Pr. 34., cited by Dallas, C. J. in *Duff v. Budd*, 3 Bro. and Bing. 182. But if a parcel is directed to a person generally, as to A. B. at Exeter, without specifying his place of abode, the carrier is not bound to carry that parcel to any place, but will fully discharge his duty by delivering it at his office, to any person coming from A. B., or whom he may reasonably presume to come from him. Per Abbott,

Obligation to deliver.

[ 105k. ]

apprised of each other's intentions, although there was

*C. J. Birkett v. Willan*, 2 Barn. and Ald. 358. But *Bailey, J.* in commenting on this case, in *Garnett v. Willan*, 5 Barn. and Ald. 58. observed, that it was the carrier's duty to carry the parcel to the house of the person for whom it was intended at Exeter, if he found the person to whom it was directed, or to keep it in order to make due inquiry to find him out.

In the case of foreign commerce, where the carriage of goods is regulated by a bill of lading, or other instrument, this duty is generally governed by the particular terms of the engagement. *Catley v. Wintringham*, Peake N. P. C. 140. *Strong v. Natally*, 1 Bos. and Pul. N. R. 16. *Gosling v. Higgins*, 1 Camp. 451. *Abbott on Shipping*.

Carrier's  
rights.

The primary and important right which the carrier possesses, is to secure the payment of his charges for the carriage of the goods, and for this purpose the law has invested him with ample remedies. He may, in the first instance, refuse to take charge of goods unless previously paid the price of their carriage, or having conveyed them to their place of destination, he may decline delivering them without such previous payment. Per *Abbott, C. J.*, 5 Barn. and Ald. 353., and in the event of waiving these rights, he may maintain an action against the consignor by the common law. *Moore v. Wilson*, 1 T. R. 660. or against the consignee by agreement, either expressed or implied.

Payment on  
delivery.

[ 105l. ]

A carrier is not compellable to receive goods without a previous tender of the charge of their carriage, vide ante, p. 103e. n. but this is seldom the object of discussion, since, in the event of the performance of the contract, the carrier is entitled to detain them until his charges are paid. This, which is a far more important privilege, is enjoyed by a carrier in common with every other bailee, and exists in all cases unless extinguished by a special agreement with which it is inconsistent. Per *Gibbs, C. J.* in *Hutton v. Bragg*, 2 Marsh. 345. A review of some of the leading principles by which this right is governed will show its particular nature, and the protection it confers, so far as relates to the present subject.



A right of lien consists in a power of detaining articles, until the charges for labour or expense incurred upon them has been satisfied, and is of two descriptions, a particular lien which is given and favorably interpreted by the common law, and a general one which exists only by usage or agreement between the parties, and is construed with more or less strictness according to its object. Per Heath, J. 3 Bos. and Pul. 494. Lord Kenyon, C. J. 1 Esp. N. P. C. 109. Lord Mansfield, C. J. 4 Burr. 2221. *Kirkman v. Shawcross*, 6 T. R. 14. *Rushforth v. Hadfield*, 6 East, 519. 7 East, 224. 2 Rose, 355. 1 Dane Abr. 262. Right of Lien.

This right, which probably owes its origin to the obligation imposed by law upon persons professing to perform particular services which public convenience requires, should not be denied, and extended, upon principles of natural justice, to every case where expenses have been incurred upon a particular article, is like a distress at common law, simply a mean of securing and compelling a payment of the charges incurred, and does not extend to authorize a sale of the article for that purpose. 2 Roll. Abr. 85. (A.) pl. 5. 1 Vent. 71. Yelv. 67. *Jones v. Thurloe*, 8 Mod. 172. *Jones v. Pearle*, 1 Str. 556. ante, p. 95 a. n. *Chase v. Westmore*, 5 Maule and Selw. 185. Such a power, however requisite in certain cases to render the right effectual, is not recognized by the law of England, although to be found in the civil law, as existing in the individual entitled to the right, or in any tribunal under whose sanction and controul it might be exercised. See 1 Bulst. 207. Bacon's Abr. tit. *Inns*.

It is a term implied by law in the contract, but may be waived by a special agreement with which it would be inconsistent: "Where there is an express antecedent contract between the parties, a lien which grows out of an implied contract does not arise." Per Lord Ellenborough, C. J. in *Stevenson v. Blake-lock*, 1 Maule and Sel. 543. See also *Cowell v. Simpson*, 16 Ves. 275. *Chase v. Westmore*, 5 Maule and S. 186. In the older books, indeed, it is laid down, that if there is a special agreement there can be no lien, and various authorities may be cited in support of that proposition. In Bacon's Abr. tit. *Trover*, E. 44. "If a person, who would otherwise have a right to detain the personal chattel of another, for the trouble or expense [ 105m. ]

he has been at concerning it, contract to be paid a sum certain for the trouble or expense, he does thereby waive the right of detaining the chattel." See, also, 2 Roll. Abr. 92 M. pl. 2. 6 Cro. Car. 271. Yelv. 66. *Bremin v. Currint*, Bull. N. P. 45 a. *Bridgman's Ed. Collins v. Ongly*, per Holt, C. J. cited by Ryder, C. J. in *Brenan v. Currint*, MSS. Selw. Nisi Prius, 1280, 4 Ed. But this doctrine has in some late cases been restricted to agreements prescribing a particular time and mode of payment which would be incompatible with the implied right. Per Gibbs, C. J. in *Hutton v. Bragg*, 2 Marsh. 345. *Chaste v. Westmore*, 5 Maule and Selw. 180. And, therefore, an agreement for the payment of a fixed sum will not have that effect, as where a quantity of corn was delivered to a miller to grind, for which it was agreed that 15s. per load should be paid, but no time fixed for the payment; in this case, the miller was decided to be entitled to his right of lien. *Chase v. Westmore*. supra. But where by the usage of trade the warfage dues upon goods were to be paid by the importer at the Christmas following the importation, whether or not they were in the mean time removed, and the goods were sold in the preceding October, and part delivered before Christmas; the wharfinger, in consequence of the bankruptcy of the importer in the March following, detained the residue for his lien in respect of the charges for wharfage, the court, however, held that he was not entitled to do so, since not having any such right at the time of the sale, he could acquire none against the buyer by the subsequent default of the seller. *Crawshay v. Homfray*, 4 Barn. and Ald. 50. So a shipwright in the river Thames has no lien on a ship taken into his dock to be repaired without an express agreement for that purpose, since, by the usage of trade, credit for repairs is given to the owner of the ship; but it would be otherwise where payment was to be made in ready money, or there was an agreement that security should be given when the work was completed. *Railt v. Mitchell*, 4 Camp. 146. See *Horncastle v. Farren*, 3 Barn. and Ald. 497.

[ 105n. ]

A right of lien, however, is only coexistent with the possession of the article, and being once parted with, cannot be revived by any subsequently acquired possession. *Kinlock v. Craig*, 3 T.

R. 119. *Sweet v. Pym*, 1 East, 4. If therefore, a person has a lien upon goods in his possession, and deliver them to a carrier consigned on account, and at the risk of his principal, he cannot, upon the event of his bankruptcy, stop them in transitu, and procure them to be re-delivered to him by virtue of a bill of lading signed by the carrier in the course of the voyage. *Sweet v. Pym*, supra. See *Man v. Shiffner*, 2 East, 523. *Hunter v. Prinsep*, 10 East, 378. And being also of a personal nature, it cannot be transferred to another by any tortious pledge of the property in respect of which it is claimed. *M'Combie v. Davis*, 7 East, 6. *Daubigny v. Duval*, 5 T. R. 606. But it may be otherwise, where one who has a lien delivers the goods to a third person as a security with notice of his lien, and appoints him to continue in possession as his servant for the preservation of his lien. *M'Combie v. Davis*, 7 East, 6.

A shipmaster does not forfeit his lien for freight by depositing the goods in the King's warehouse, according to the requisition of an Act of Parliament. Per Lord Ellenborough, in *Ward v. Felton*, 1 East R. 507.

Having premised these general principles, it may be observed that a particular lien extends only to the individual article in respect of which the charges have been incurred, for which the right is claimed. Per Heath, J. 3 Bos. and Pul. 494. See 4 Barn. and Ald. 343.; [and Hartshorne & Vanmator ads. Johnson. 2 Halst. Rep. 108.] But where a quantity of goods are delivered in separate quantities at different times, yet if they form one entire agreement, the right of lien attaches upon each part for the expenses incurred with respect to the whole. *Chase v. Westmore*, 5 M. and S. 181. *Blake v. Nicholson*, 3 M. and S. 167. See *Sodergren v. Flight*, cited 6 East, 622. A carrier, by the common law, is entitled to this right, and may justify the detention of goods, until he is paid the carriage price of the particular articles on which his hire is due. *Skinner v. Upshaw*, 1 Lord Raym. 752. [1 Cons. Rep. S. C. 186. *Hayward v. Middleton*, 2 Halst. Rep. 108 Hartshorne and Vanmator ads. Johnson.] So, the master of a vessel has a lien upon the luggage of a passenger for the passage-money agreed to be paid; or when there is no agreement for a fixed price, until he is paid a reasonable

[ 105o. ]

sum. *Wolf v. Summers*, 2 Camp. 631. In the same manner, a carrier by water is entitled to a lien for his freight. *Sodergren v. Flight*, cited 6 East R. 622.

[Freight is a lien upon the cargo. *Cowing v. Snow*, 11 Mass. Rep. 415. *Gracie v. Palmer*, 8 Wheat. Rep. 605. 4 Mass. Rep. 91. 6 *ibid.* 422.]

And where the owner of a vessel covenanted by charter party to let the vessel on freight, and to deliver the cargo in good condition, and the freighters covenanted to pay the freight on delivery of the cargo, part in money, and the remainder by bills at four months; it was decided, that the owner might detain the cargo until payment of the freight, the delivery of the cargo and the payment of the freight being concurrent acts. *Yates v. Rollin*, 8 Taun. 293. See *Hutton v. Bragg*, 2 Marsh. 345. *Christie v. Lewis*, 2 Bro. and Bing. 410. *Saville v. Campion*, 2 Barn. and Ald. 503.

A captain of a vessel who is personally responsible for articles furnished to the ship, is thereby entitled to a lien on the goods as well as freight; and if a consignee, after notice from the captain, pay the freight to the owners, he will still remain liable to the captain. *Waring v. Bell*, 4 Esp. N. P. C. 22. But the captain has no lien on the ship for money expended, or debts incurred for repairs done abroad in the course of the voyage. *Hussey v. Christie*, 9 East, 426. See *Abbott on Shipping*, 137. 4th ed.

**General lien.**

A right of general lien is not limited to the particular article upon which expenses have been incurred, but extends to all goods in the possession of the party claiming it for the balance of the general account between the parties. Per *Heath, J.*, 3 Bos. and Pul. 494. The common law does not recognize this right, but it may exist by special agreement; and in the case of a common carrier, upon whom the law imposes certain duties, stricter proof is required than in the case of persons who are not subject to such obligations. "Growing liens are always to be looked at with jealousy, and require stronger proof; they are encroachments on the common law." Per *Lord Ellenborough, C. J.*, in *Rushforth v. Hadfield*, 7 East, 229.

A carrier may establish a claim to this right by a special contract with his customer in the particular case, or it may be inferred from the usual course of their dealings. *Rushforth v. Hadfield*, 6 East, 522., 7 East, 224. So, a general notice may be sufficient for this purpose. But notice given by a carrier "that all goods from whomsoever received, or to whomsoever belonging, should be subject to a lien, not only for the freight of the particular goods, but also for any general balance that may be due from the person to whom they are consigned or addressed," was decided not to extend, as against the principal, to goods transmitted to a mere factor for the debt due by him to the carrier. However, such an agreement, it appears, between the carrier and the owner of the goods, may be binding. *Wright v. Snell*, 5 B. and A. 350. The right may also exist by usage of trade; but to establish the claim upon this ground it is necessary that the usage should be general and uniform, and of such notoriety, that persons dealing with the carrier may fairly be presumed to have dealt with him with reference to such usage. Evidence of a few recent instances of the exercise of this right by carriers will not be sufficient. *Rushforth v. Hadfield*, 7 East, 224. But in an action of trover against a carrier for goods which he claimed to detain by reason of a general lien, this right was established, by evidence of the defendant having before claimed, and been allowed to retain for his general balance, both against bankrupt estates and solvent customers, and also by the evidence of a principal carrier on the western road to the same effect, respecting himself. *Aspinall*, assignee of *Howarth*, v. *Pickford*, 3 Bos. and Pul. 44. n. (a.)

In cases of this description, the agreement, or usage relied upon, must in general be proved; but the proof of usage of trade has in some cases been dispensed with. In the case of *Naylor v. Mangles*, 1 Esp. N. P. C. 109., where the sole question was, whether a wharfinger had a lien for the balance of his general account upon the goods in his possession, Lord Kenyon, C. J., observed, that a lien from usage was matter of evidence, and that the usage in the present case had been proved so often, that it should be considered as a settled point, that the wharfinger had the lien contended for. And in the case of *Spears v. Hart-*

ley, 3 Esp. N. P. C. 81. Lord Eldon, C. J., on the authority of the preceding case, held that a wharfinger has such lien; and further, that, although the statute of limitations had run against a demand, if the creditor obtains possession of goods on which he has a lien for a general balance, he may hold them for that demand by virtue of the lien, for the debt is not discharged by the statute, but only the remedy. See *Crawshay v. Homfray*, 4 Barn. and Ald. 50. An usage for carriers to retain goods as a lien for a general balance of account between them and the consignees, cannot affect the right of the consignor to stop the goods in transitu. *Oppenheim v. Russel*, 3 Bos. and Pul. 42. So, a carrier who, by the usage of a particular trade, is to be paid for the carriage of goods by the consignor, has no right to retain them against the consignee for a general balance due to him for the carriage of other goods of the same sort sent by the consignor. *Butler v. Woolcott*, 2 Bos. and Pul. N. R. 64.

Consignor's liability.

The consignor is responsible by law to the carrier for his charges in the carriage of the goods, and the carrier may consequently maintain an action against him for their amount. In an action by the consignors ~~for~~ not safely carrying and delivering goods sent by the plaintiffs, the declaration alleged that the defendant undertook to carry the goods "for a certain hire and reward to be paid by the plaintiffs," and upon proof at the trial that the consignee had agreed to pay it, the plaintiffs were nonsuited; but upon application to set aside this nonsuit, Buller, J., before whom the cause was tried, observed, that on considering the question, he found he had been mistaken in point of law; for that, whatever might be the contract between the vendor and the vendee, the agreement for the carriage was between the carrier and the vendor, the latter of whom was by law liable; and the other two judges being of the same opinion, the rule was made absolute without further argument. *Moore v. Wilson*, 1 T. R. 659. But see *Daws v. Peck*, 8 T. R. 334. In an action for freight, damage done to the goods by bad stowage cannot be given in evidence, either as a complete defence, or in mitigation of damages. *Sheels v. Davis*, 4 Camp. 119.

Delivery between Consignor and Consignee.

The seller is bound to follow the directions prescribed by the purchaser, in the execution of an order for sending goods.

Cooke v. Ludlow, 2 N. P. 119. Hawkins v. Rutt, Peake, 186, since he sustains the risk of their conveyance; but, in the absence of any specific directions upon that subject, the seller will be considered as duly performing his part of the contract, if he send them by the usual and accustomed mode of conveyance. [ 106b. ] Clark v. Hutchins, 14 East, 475. 1 Stark. N. P. C. 17. The seller in forwarding goods will not be responsible for a loss where he has not been guilty of negligence; as where the plaintiff received an order to send certain goods to the defendant living at Bristol, by any conveyance which would reach that place, informing him when they were sent, that he might know when to expect them: the goods were accordingly delivered to a wharfinger to go by a particular vessel, directed to the defendant, and a letter written informing him of the fact; this vessel, however, being full, they did not go by that conveyance, but were sent by another vessel on the following day. The defendant made repeated inquiries after the goods without success, but never wrote to the plaintiff to apprise him of the circumstance. The goods having been lost, it was decided, in an action against the defendant for the value of the goods, that the wharfinger was not, in any degree, the agent of the plaintiff, but of the defendant, by whose order and direction the goods were sent, and that no negligence was imputable to the plaintiff, for not inquiring after the vessel, but that the defendant should have given due notice that they had not been received. Cooke v. Ludlow, 2 Bos. and Pul. N. R. 119.

The effect of a delivery of goods to a carrier, on behalf of the buyer, is to vest the property in him absolutely from the time of the delivery, and to render him responsible for any injury they may afterwards sustain. Dutton v. Solomonson, 3 Bos. and Pul. 582. Dawes v. Peck, 8 T. R. 330. And if the consignee at the moment of delivery is under age, although he attain his full age before he receives the goods, he may rely upon his infancy as a defence to an action for the value of the goods. Griffin v. Lanfield, 3 Camp. 255. This general principle is not affected by the consignor paying for the booking of the goods. Dawes v. Peck, 8 T. R. 330., or by his being responsible to the carrier for the price of the carriage, for that does not make him

Effect of such delivery.

[ 106c. ]

an insurer of the goods while under the carrier's care. *King v. Meredith*, 2 Camp. N. P. C. 639. The rule also prevails not only when goods are sent from one part of England to another, but also to the case of goods sent from England to a foreign country; for, whether the goods are delivered on board a vessel abroad, to the order of a person resident in this country. *Godfrey v. Furze*, 3 Pere Wms. 186.; or sent from hence to the order of persons resident abroad. *Brown v. Hodgson*, 2 Camp. 36., the property equally vests in the consignee. There is also no distinction between the cases where the carrier is named by the consignee, and where he is not named; in both cases the property vests in him upon the delivery. In *Vale v. Bayle*, Cowp. 296, the seller had been in the habit of sending goods to the buyer by water, but in the pursuance of a letter, desiring them to be sent by a particular carrier by land, he sent them according to his directions, and the delivery was holden to vest the property in the buyer. See *Dawes v. Peck*, 8 T. R. 330. So, in the case of *Dutton v. Solomonson*, 3 Bos. & Pul. 582., upon an objection that the property did not vest in the vendee by a delivery to a carrier not named by him, Lord Alvanley, C. J. observed, "that it appeared to him to be a proposition as well settled as any in the law, that if a tradesman order goods to be sent by a carrier, though he does not name any particular carrier, the moment the goods are delivered to the carrier, it operates as a delivery to the purchaser; the whole property immediately vests in him; he alone can bring an action for any injury done to the goods; and if any accident happen to the goods, it is at his risk." So, in the case of *Godfrey v. Furze*, 3 P. Will. 185., it was said by counsel in argument, and assented to by Lord Chancellor King, that if a tradesman in London send goods by order to a tradesman in the country, by a carrier not appointed by the country trader, if the carrier embezzles the goods, the trader in the country must stand to the loss. In the same manner, if goods are delivered to a carrier, or hoyman, to be delivered to A., and the goods are lost, A. can only bring the action, which shows the property to be in him. Per Lord Hardwick, in *Snee v. Prescott*, 1 Atk. 248. So, where goods were sent from Manchester to London by a



carrier not appointed by the purchaser, but by the usual conveyance, the delivery to the carrier was decided to vest the property in the buyer, and from that instant the goods were at his risk. *Dutton v. Solomonson*, 3 Bos. and Pul. 582. In these cases, however, the seller may retain a controul over the goods by qualifying the delivery, as where goods delivered on board a vessel are expressed in the receipt given to the lighterman, to be for and on account of the shipper; this will give the holder of the receipt a controul over the goods until exchanged for the bill of lading. *Craven v. Ryder*, 6 Taun. 435. And the master of the vessel, upon tender of such a receipt by a lighterman, is bound to sign it, and his refusal to do so will not impair the right of the seller. *Ruck v. Hatfield*, 5 Barn. and Ald. 632. See *Goodhart v. Lowe*, 2 Jac. and Walk. 349. [ 106d. ]

A delivery of goods to a wharfinger to be forwarded to the buyer, according to a previous course of dealing between the parties, does not constitute an acceptance within the statute of frauds. 29 Cha. 2. c. 3. s. 17. In the case of a delivery to an agent, who is merely authorized to receive the goods, and not to judge of their quantity and quality, so as to render the contract conclusive, the delivery will not satisfy the terms of the statute; for there can be no actual acceptance of the goods, so long as the buyer continues to have a right to object to them upon either of those points. *Hanson v. Armitage*, 5 Barn. and Ald. 557. Vide *Astey v. Emery*, 4 M. and S. 262.

The vesting of the property in a buyer, upon a delivery of goods to a carrier on his account, prevails absolutely in all cases; but there is one instance in which a vendor is allowed to resume the possession: when goods have been sold, and not paid for, by reason of credit being given or otherwise, and the vendee to whom they have been consigned, becomes insolvent, the seller may seize the property at any time before they come into the possession of the buyer. This right, usually termed a stoppage in transitu, and originally adopted in the courts of Chancery. *Wiseman v. Vandeput*, 2 Vern. 203. *Snee v. Prescott*, 1 Atk. 245. *D'Aguila v. Lambert*, Ambler, 399., but now established and favourably received in courts of law, 5 East, 180, is founded upon principles of equity and natural justice, in order

[ 106e. ]

to indemnify the seller from the loss which he would otherwise sustain where the chance of payment is hopeless. See *Ellis v. Hunt*, 3 T. R. 469. *Lickbarrow v. Mason*, 2 T. R. 75. S. C. 5 T. R. 683. 1 H. B. 357. But a court of equity will not exercise this right on behalf of a purchaser; for where goods had been delivered on board a vessel on the vendor's account, and for which payment was to be made at the time of the shipment, an injunction was refused, upon application for that purpose, to restrain the sailing of the vessel. And with respect to the stoppage of goods in transitu, it appears, that a court of equity has no jurisdiction upon the subject. *Goodhart v. Lowe*, 2 Jac. and Walk. 349. This right is not founded upon property, but necessarily supposes it to be in some other person, and not in him who sets it up. Per Buller, J. in *Lickbarrow v. Mason*, 6 East, 24. n. a. Nor does it proceed upon the ground of rescinding the contract, but is a kind of equitable lien, adopted by the law, for the purposes of substantial justice. Per Lord Kenyon, in *Hodgson v. Loy*, 7 T. R. 445. 12 Ves. 382. The law upon this subject may be considered with reference to—1. The cases in which, and the persons by whom the right may be exercised. 2. The continuance or determination of the transitus: and 3. The means by which the right of the consignor may be taken away.

In what cases,  
and by whom  
exercised.

With respect to the cases in which this right may be exercised, it may be observed, that it is not an unlimited power vested in the consignor, of varying the consignment at his pleasure, in all cases whatever, but is limited to the sole case of the insolvency of the consignee. *The Constantia*, 6 Rob. 321. Per Gibbs, C. J., 1 Marsh. 327. Upon his bankruptcy, or becoming insolvent, goods consigned to him, and in the course of their journey, may be stopped in transitu; but if the right is exercised as a measure of precaution, upon a supposition of insolvency, which ultimately turns out to be unfounded, the rights of the consignee will not be affected. *The Constantia*, supra.

The vendor, or the person standing in this relation to the bankrupt or insolvent consignee, is the proper person to exercise this right; for if he is merely a surety for the price of the goods, he is not entitled to stop them in transitu. In the case

of *Ferse v. Wray*, 3 East, 93., the consignee, who had become bankrupt, gave orders to his correspondent at Hamburgh, to buy for him a quantity of goods, which he accordingly bought, upon his sole credit, of persons having no account or correspondence with the bankrupt, and shipped them on board a general ship, directed to the bankrupt, and the bill of lading was filled up to his order: the correspondent drew bills of exchange upon the bankrupt for the price of the goods, including a charge for the commission. The bills were not paid, and the consignee having become bankrupt before the arrival of the goods, the agent of the correspondent stopped them in transitu upon their arrival in England. In an action of trover against the agent, brought by the assignees of the bankrupt, to recover the value of the goods, Mr. Justice Lawrence in delivering his opinion, observed, "that it had been contended that the right of stopping in transitu does not attach between these parties; that the bankrupt must be considered as the principal for whom the goods were originally purchased; and that the correspondent was no more than his factor or agent, purchasing them on his account; and that the right of stopping in transitu does, in point of law, apply solely to the case of vendor and vendee. If that were so, it would nearly put an end to the application of that law in this country; for I believe it happens, for the most part, that orders come to the merchants here from their correspondents abroad, to purchase and ship certain merchandize to them: the merchants here, upon the authority of those orders, obtain the goods from those whom they deal with, and they charge a commission to their correspondents abroad, upon the price of the commodity thus obtained. It never was doubted but that the merchant here, if he heard of the failure of his correspondent abroad, might stop the goods in transitu. But, at any rate, this is a case between vendor and vendee; for there was no privity in the original owner of the goods and the bankrupt; but the property may be considered as having been first purchased by a correspondent, and again sold to the bankrupt at the first price, with the addition of his commission upon it. He then became the vendor as to the bankrupt, and, consequently, had a right to stop the goods in transitu; and so it is admitted that he might [ 106f. ]

[ 106g. ]

in the argument, considering the correspondent as vendor, unless he is stopped by the circumstance of the bankrupt having accepted bills for the amount ; which bills, it is contended, may be proved under the bankrupt's commission, and are equivalent at least to part payment of the goods ; but it was decided in *Hodgson v. Loy*, 7 T. R. 440., that part payment for the goods does not conclude the right to stop in transitu ; it only diminishes the vendor's lien pro tanto on the goods detained. Then, having lawfully possessed himself of them, he has a lien on them till the whole price is paid, which cannot therefore be satisfied by showing a part payment only. It is possible that part payment may be obtained by proving the bills under the bankrupt's commission ; but if the loss must fall on one side or the other, the maxim applies, *Qui prior est tempore potior est jure.*" But a correspondent not concerned in the purchase of the goods, but who merely accepts bills on behalf of his principal, and receives a commission upon the amount, does not stand in the relation of vendor towards the principal, but is a mere surety for the price of the goods, and consequently not entitled to stop them in transitu. *Siffkin and another v. Wray*, 6 East, 371.

The circumstance of the vendee having partly paid for the goods, does not destroy the vendor's right to stop them in transitu, upon the bankruptcy of the vendee, for the vendor has a right to retake them unless the whole price has been paid. The operation of a partial payment is merely to diminish the lien pro tanto. *Hodgson v. Loy*, 7 T. R. 446. 3 East, 102. So, goods consigned to a factor, who accepts bills upon the faith of the consignment, and pays part of the freight before it arrives, but becomes insolvent before the bills are due, may be stopped in transitu by the consignor, before they get into the actual possession of the factor. *Kinlock v. Craig*, 3 T. R. 119. The vendor's right, also, will not be defeated by the acts of persons who derive their claims from the consignee ; as where the goods during their transit are attached by process out of the Mayor's Court, at the suit of the consignee's creditor. *Smith v. Goss*, 1 Camp. 282. ; or by a common carrier who claims to retain the goods as a lien for his general balance due to him from the con-

no personal communication, the bailee may be consi-

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signee. *Butler v. Wolcott*, 2 N. R. 64. In these cases the right of the vendor is the elder and preferable lien.

A person who has a lien upon goods, and delivers them to a carrier on the account, and at the risk of the principal, cannot, in the event of his bankruptcy, stop the goods in transitu, for his lien ceases with the possession, and the delivery to the captain is equivalent to a delivery to the principal. *Sweet v. Pym*, 1 East, 4.

[ 106h. ]

With respect to the continuance or determination of the transitu, much will depend upon the particular circumstances of the case; but it will be considered to be continuing until the goods come to the actual or constructive possession of the consignee. An actual possession of the goods, by a corporal seizure of them, was formerly holden to be requisite in order to exercise the right of stoppage in transitu. In the case of *Hunter v. Beal*, cited 3 T. R. 466. Lord Mansfield was of opinion that to deprive the vendor of his right, there must be an absolute and actual possession by the consignee, or, as his Lordship expresses it, they must have come to the corporal touch of the vendee. The expression, however, has been considered as too comprehensive, and of a figurative nature rarely if ever strictly true. Per Lord Kenyon, C. J. in *Wright v. Lawes*, 4 Esp. N. P. C. 82. post 106. s. Per Lord Ellenborough, C. J. in *Dixon v. Baldwin*, 5 East, 184. post 106. l. *Ellis v. Hunt*, 3 T. R. 468. And latterly, when greater liberality has prevailed in the construction of this doctrine, and a disposition has been evinced of conferring in this respect a more enlarged benefit upon vendors, not only has the obtaining actual possession been dispensed with, but a constructive one, or even a notice given to the carrier, has been deemed a sufficient exercise of the right. *Litt v. Cowley*, 2 Marsh. 459. *Northey v. Field*, 2 Esp. N. P. C. 613. vide post 106n. In the case of goods delivered to a carrier, whether by land or water, the transitu will be deemed to be continuing during the course of conveyance to their place of destination. See *Stokes v. La Riviere* and cases infra. And this principle

Continuation  
of transitu.

dered as a *special* acceptor : this was adjudged in a very

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will not be affected by a transference of the goods to different carriers, for the purpose of forwarding them to their ultimate place of destination, as far as relates to the seller and the buyer or his agents. *Hodgson v. Loy*, 7 T. R. 440. See *Dixon v. Baldwin*, 5 East, 185.

[ 106i. ] A delivery on board a chartered ship does not preclude the right of the consignor to stop the goods in transitu while on board the same to the vendor, in the event of his insolvency before actual delivery, any more than if they had been delivered on board a general ship for the same person. *Bothlingk v. Inglis*, 3 East, 380. See the case of *Inglis v. Usherwood*, 1 East, 515. where a contrary doctrine was holden. But in the case of a vessel chartered by the consignees for three years, for which they were to find stock and provisions, and to pay the master, and have the entire disposition and complete controul over the ship, during the period for which it was engaged, a delivery on board the vessel was holden to be a delivery to the buyers *Fowler. and another, Assignee of Hunter and Co., v. M'Taggart and Co.* cited in 7 T. R. 442. 1 East, 522. and 3 East, 388. So, where the plaintiff, a trader of London, in danger of insolvency, went to Glasgow, and obtained goods from a merchant there, and paid for them by a bill upon a house in London, which he knew to be insolvent ; the goods were shipped at Leith, deliverable at the Glasgow wharf, London, and the receipt expressed them to be received *from the plaintiff*. The plaintiff having become bankrupt, the seller gave notice to the wharfinger in London, at whose wharf the goods had arrived, to hold them on his account, which he accordingly did. In an action of trover by the consignee against the wharfinger for the value of the goods, the court were of opinion that there was no pretence for stopping the goods in transitu, as the receipt showed that the delivery to the plaintiff was complete. *Noble v. Adams*, 2 Marsh. 366. But a delivery on board a vessel for and on account of the sellers, notwithstanding the captain refused to sign a receipt to that effect, and afterwards signed bills

modern case particularly circumstanced, in which the

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of lading to the order of the vendees, who had accepted a bill for the amount of the goods, will not destroy the vendor's right to stop them in transitu. In such a case it is the duty of the defendant to sign the receipt, and not to sign the bills of lading until the receipt is handed over to the buyer, and by him to the defendant. *Ruck v. Hatfield*, 5 B. and A. 632. But had the delivery on board the vessel to the vendee been complete, the transitus would have been at an end, S. C. See *Goodhart v. Lowe*, 2 J. and W. 349. and post, 106w n.

In the case of *Stokes v. La Rivjere*, cited in *Bothlingk v. Inglis*, 3 East, 397. 3 T. R. 466. 5 East, 184. Messrs. Duhem and Co. of Lisle, had purchased a quantity of goods of the plaintiff and other persons, which were delivered to the defendants for the purpose of being forwarded to Lisle. The defendants accordingly sent them to their correspondent at Ostend for that purpose, and upon receipt of the goods, he wrote to Messrs. Duhem and Co. apprizing them of the circumstance. The Duhems having become bankrupt while the goods were at Ostend, the defendants, having considerable demands upon them, countermanded the orders which they had given to their correspondent, and subsequently obtained possession of the goods. In an action by the plaintiff to recover their value, it was contended on the part of the defendants, that immediately upon the delivery of the goods by the plaintiff to them, the property vested in Messrs. Duhem, and that the defendants had a right to detain them. But Lord Mansfield, C. J. said, "no point is more clear, than that if goods are sold, and the price not paid, the seller may stop them in transitu; I mean in every sort of passage to the hands of the buyers. There have been an hundred cases of this sort. Ships in harbour, carriers, bills, have been stopped. In short, where the goods are in transitu, the seller has that proprietary lien. The goods are in the hands of the defendants to be conveyed: the owner may get them back again." See *Dixon v. Baldwin*, 5 East, 185. So, where a bale of cloth, which was sent by Messrs. Steers and Co. of

[ 106k. ]

former cases in *Ventris*, *Alleyne*, and *Carthew*, are ex-

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Wakefield, to the defendant, who was an innkeeper, directed for the bankrupts; to whom the defendant's book-keeper gave notice that a bale was arrived for them; and Steers and Co. at the same time sent them a bill of parcels by the post, the receipt of which they acknowledged, and wrote word that they had placed the amount to the credit of Steers and Co. The bankrupts gave orders for the defendant's book-keeper to send the bale down to the Galley Quay, in order to ship it on board the *Union*, to be carried to Boston. The defendant accordingly sent the bale to the quay; but arriving too late to be shipped, it was sent back to him. Within ten days afterwards a clerk of the bankrupts went to the defendant's warehouse, when the defendant asked what was to be done with the bale in question; and was ordered to keep it in his custody till another ship sailed, which would happen in a few days. The bankruptcy happened soon afterwards; and Messrs. Steers and Co. sent word to the defendant not to let the bale out of his hands: accordingly when the bankrupts applied for it, he refused to deliver it up. Lord Mansfield was clearly of opinion that, though the goods might be legally delivered to the vendees for many purposes, yet for this purpose there must be an absolute and actual possession by the bankrupts; or (as his Lordship expressed it) they must have come to the corporal touch of the vendees; otherwise they may be stopped in transitu, a delivery to a third person to convey to them is not sufficient. *Hunter v. Beal*, cited 3 T. R. 466. The authority of this case has, however, been much impaired by subsequent cases. See *Litt v. Cowley*, 2 Marsh. 457. And Lord Ellenborough, C. J. in commenting upon it, in *Dixon v. Baldwin*, 5 East, 184. observes—"As to "*Hunter v. Beal*, in which it is said that the goods must come "to the corporal touch of the vendees, in order to oust the right "of stopping in transitu, it is a figurative expression, rarely, if "ever, strictly true. If it be predicated of the vendee's own "actual touch, or of the touch of any other person, it comes in "each instance to a question, whether the party to whose touch



amined with liberality and wisdom ; but, in all of them,

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“ it actually comes, be an agent so far representing the principal, as contradistinguished from a delivery to a person virtually acting as a carrier, or mean of conveyance to or on the account of the principal, in a mere course of transit towards him. I cannot but consider the transit as having been once completely at an end in the direct course of the goods to the vendee, i. e. when they had arrived at the innkeeper's, and were afterwards, under the immediate order of the vendee, thence actually launched again in a course of conveyance from him in their way to Boston ; being in a new direction prescribed and communicated by himself. And if the transit be once at an end, the delivery is complete ; and the transitus for this purpose cannot commence de novo, merely because the goods are again sent upon their travels towards a new and ulterior destination.”

In the same manner, where a trader at North Taunton, in Devonshire, gave orders to the plaintiff to send him a quantity of goods from London, not directing that they should be sent by any particular vessel, but simply that they should be sent to Exeter, to be forwarded to him at North Taunton ; they were accordingly shipped, arrived at Exeter, and were put into the hands of a wharfinger to be forwarded to their journey's end. In the books of the wharfinger they were put to the account of the consignee, as the person to whom they were directed, and he was considered as the wharfinger's paymaster. In this state of things the plaintiffs [ 106m. ] received a letter from the consignee, informing them that his situation was such that he could not receive the goods, and offered to them that they might take them back, if they thought proper. The plaintiffs immediately, on the receipt of this letter, sent to the wharfinger, and forbade him to deliver them according to the direction. The wharfinger promised not to deliver them till he could do so with safety, notwithstanding which he afterwards delivered them to the assignees of the consignee. Under these circumstances the question was, whether the goods in the hands of the wharfinger were in such a situation that the vendors could stop them ?

too great stress is laid on the *reward*, and too little on

The court decided that they were ; for although there was no corporal touch, yet that took place which was equivalent to it. The plaintiffs gave notice to the wharfinger, and demanded the goods as their property ; and the defendant undertook not to deliver them till he was certain of a safe delivery. *Mills and others v. Ball*, 2 Bos. and Pull. 457 So where the plaintiff received an order for a quantity of goods which were sent, according to the buyer's directions, to the defendant, who was a wharfinger, for the purpose of being forwarded to the consignee ; the goods in the defendant's possession were considered merely as at a stage upon their transit ; and that the consignor was accordingly entitled to stop them in transitu. *Smith v. Goss*, 1 Camp. 282.

In the same manner, where A. agreed to buy some articles of plate of B. who was to get A.'s arms engraved on them ; a delivery for that purpose to the engraver usually employed by B. to whom the plate was to be brought back by the directions of both parties, and the engraving paid for by him, was holden not to be a delivery to A. so as to defeat B.'s right of stopping the goods in transitu, upon failure to pay the price of the goods. *Owenson v. Morse*, 7 T. R. 64. So, where goods have been sent by orders from the vendee to the packer, who was considered as a middle-man between the vendor and vendee, the court held, that the goods might be stopped in transitu, on the bankruptcy of the vendee *Hirst v. Ware*, cited 3 T. R. 467. See *Dixon v. Baldwin*, 5 East, 185. and cases *infra*.

[ 106n. ] The arrival of a ship at her port of destination, and the taking actual possession of her by the consignee, will not deprive the vendor of his right to take possession of the property, where certain acts are to be done before the vessel can be unloaded. In a case where a vessel, upon her arrival in port, was taken possession of by the assignee of the buyer, who had become bankrupt, but was ordered back to perform quarantine, and the vendor claimed the goods before the quarantine was completed, his resumption of the property was holden to be legal. The taking possession, in order to divest the vendors of

the important motives of *public utility*, which alone

their right, must take place at the termination of the voyage, which is not complete, until the vessel has performed quarantine; and the consignee cannot anticipate this event by going out to meet the vessel. *Holst v. Pownal*, 1 Esp. N. P. C. 240. So, where the person to whom the goods were consigned, became bankrupt after the ship arrived, but before the time for the payment of the duties expired, the goods, during this period being retained on board, and afterwards removed to the king's cellar, the consignor, before the sale usually made in order to defray the duties, applied for the goods without success, but having received the proceeds of the sale, the assignee of the buyer brought an action to recover the amount, contending, that the property was devested out of the consignor by the goods coming to the bankrupt. But Lord Kenyon, C. J. was of opinion, that the plaintiff was not entitled to recover. His lordship observed, that the court had of late years much inclined in favour of the consignor's power to stop goods in transitu; that the rule laid down by Lord Hardwick, of the necessity of actual possession, in order to secure the right, was much relaxed, and that he subscribed to the rule, that a claim was sufficient. In this case, until the duties were paid, the goods were *quasi in custodia legis*, and the claim by the consignor's agent, before the sale, was a sufficient stoppage in transitu. *Northey v. Field*, 2 Esp. 613. So, where goods were delivered to a carrier, to be conveyed to the buyer, and the seller, while they were in transitu, gave notice not to deliver them; but, by the mistake of the carrier, they were delivered to the buyer, who disposed of part of them, and soon after became bankrupt, the court held, that the delivery was incomplete, and that trover might be maintained against the assignees, for the delivery by mistake conveyed no property to the bankrupt; and that the notice devested the purchaser of the property, and revested it in the seller. *Litt v. Cowley*, 2 Marsh. 457. 7 Taun. 169.

[ 106a. ]

The preceding cases show the particular circumstances which have been decided to establish a continuance of the transitus;

Determina-  
tion of the  
transitus.

*distinguish a carrier from other bailees for hire.(f)*

(f) Burr. 2298. Gibben and Paynton. See 1 Vent. 1238. All. 93. Carth. 485. (40.)

with respect to its determination, it may be observed, that an actual or constructive delivery of the goods, on their arrival at the ultimate place of their destination, will have that effect. The following cases will show the grounds upon which the courts have proceeded in this branch of the subject.

A delivery of part of the goods sold by an entire contract will be considered to be a delivery of the whole, there appearing no intention either previous to, or at the time of, the delivery, to separate part of the cargo from the rest. *Slubey v. Heyward and others*, 2 Hen. Bl. 504. 12 Ves. 381. As when A. at a foreign port, ships goods by the order and on the account of B. to be paid for at a future day, and bills of lading are accordingly signed by the master of the ship. One of the bills is immediately transmitted to B. who, before the arrival of the ship at the place of destination, sells the goods, and endorses the bill of lading to C. After the arrival of the ship, and a delivery of part of the goods to the agent of C., B. becomes bankrupt without having paid A. the price of the goods. By this delivery the transitus is at an end, as to the whole of the goods. *Slubey v. Heyward*, 2 Hen. Black. 504. So, where a number of bales of bacon, then lying at a wharf, having been sold for an entire sum, to be paid for by a bill at two months, an order was given to the wharfinger to deliver them to the vendee, who went to the wharf, weighed the whole, and took away several bales, and then became bankrupt; whereupon the vendor within ten days of the time of sale, ordered the wharfinger not to deliver the remainder. By the custom of trade, the charges of warehousing were to be paid by the vendor 14 hours after the sale. The court held that the vendee had taken possession of the whole, and that the vendor had no right to stop what remained in the hands of the wharfinger. *Hammond v. Anderson*, 1 N. R. 69. See *Hanson v. Meyer*, 6 East, 614. *Rugg v. Minett*, 11 East, 210. *Zagury v. Furnell*, 2 Camp. 240.

Though no substantial difference is assignable between Law concerning masters of vessels.

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Hinde v. Whitehouse, 7 East, 558. Stoveld v. Hughes, 14 East, 308.

An actual transfer of the goods is not necessary to constitute such a delivery as will vest in the buyer an uncontrollable right to the property. If the goods at the time of the sale are in the vendor's warehouse, and he receives warehouse rent for them, this will be a complete transfer of the property, and extinguish the right of stoppage in transitu. The payment of rent for a part of the warehouse so far appropriates that portion to the use of the buyer as to make the delivery similar to the one at his own warehouse. Hurry v. Mangles, 1 Camp. N. P. C. 452. And where the defendants sold a quantity of timber then lying at their own wharf to J. S. for bills payable at a future day, and at the time of sale J. S. put his mark upon the timber, a small part of which was forwarded by the defendants to one place, and part to another, and then J. S. before the time of payment arrived, sold the whole to the plaintiffs. They notified the sale to the defendants, who answered that it was very well, and afterwards, in their presence, the plaintiffs put their mark upon the whole of the timber lying at the defendant's wharf. The defendants' assent to the sale, and the marking of the timber by the plaintiffs, were holden to constitute an executed delivery to the plaintiffs, and consequent termination of the transitu, which deprived the defendant of all right to stop the goods in transitu. Stoveld v. Hughes, 14 East, 308. So, where the purchaser of goods has lodged an order to deliver them with the wharfinger in whose warehouse they lie, and the latter has transferred them in his books into the name of the purchaser, the vendor's right to stop them in transitu is gone, and the wharfinger is bound to hold them as the agent of the purchaser. From the moment of the transfer there is an executed delivery of the goods as much as if they had been delivered into the vendee's hands. Harman v. Anderson, 2 Camp. 243. And the same effect is produced by the delivery note being lodged with the wharfinger without a transfer in his books. S. C. and see S. P, [106q.]

carriage by *land* and carriage by *water*, (2) or, in other

Per Gibbs C. J. in *Withers v. Lyss*, 4 Camp. 240. So, where goods are entered in the books of the West India dock company, in the name of A., who receives the usual cheque for them, which having sold the goods to B., he endorses and delivers to him: B. sells the goods and delivers the cheque to C. on credit. On C.'s insolvency, A. cannot lawfully take possession of the goods, although they have continued to stand in his name, and the cheque has not been lodged with the dock-company. *Spear v. Travers*, 4 Camp. 251.

But when something remains to be previously done before the delivery can take place, the delivery of the order to the warehouseman will not have that effect. A particular parcel of goods in the possession of a warehouseman, is sold at so much the cwt., the weight of the whole being uncertain, to be paid by a bill of exchange. The vendor gives the purchaser an order to weigh and deliver the goods, which is lodged with the warehouseman: but before the goods are weighed the purchaser becomes insolvent. The vendor has a right to stop them in transitu. *Withers v. Lyss*, 4 Camp. 237. The necessity for the performance of some previous act, as the weighing in this instance, has in several cases been considered sufficient to countervail the effect of the delivery of an order to a warehouseman, and an entry in his books, and to entitle the seller, upon the insolvency of the vendee, to countermand the delivery. *Busk v. Davis*, 2 Maul. and Selw. 397. *Shepley v. Davis*, 1 Marsh. 252.

The termination of the transitus will be considered to be complete upon the arrival of the goods at the place of their ultimate destination as between the buyer and the seller, and although they have not arrived at the residence of the consignee, yet in certain cases where he has taken possession of them, and exercised acts of ownership, it will be sufficient.

In the cases of *Ellis v. Hunt*, 3 T. R. 464. the consignee had ordered a quantity of files of the plaintiffs, who were manufacturers, at Sheffield, which were packed in a cask and sent di-

words, between a *waggon* and a *barge*, yet it soon be-

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rected to the consignee. The plaintiffs drew a bill on the consignee for the value of the goods, which was never paid. Immediately upon the arrival of the goods they were attached at the suit of certain creditors of the consignee, by process of foreign attachment out of the Mayor's Court of London, and the cask remained at the inn, charged with such attachment, so far as the same could charge it. Before, however, the goods arrived, the consignee became bankrupt, and the provisional assignee demanded possession of the goods from the carrier, and put his mark upon the cask, but did not take them away. The consignors hearing of the bankruptcy of the consignee, afterwards demanded the cask of the carrier, and upon his delivering them up to the assignees, the attachment being withdrawn, they brought an action of trover against him to recover the value of the files. The court, however, decided that the goods were not in transitu at the time the plaintiffs wrote to countermand the delivery of them, before that the assignee had put his mark upon the cask, which was considered as taking actual possession. When the goods were marked, they were delivered to the consignee as far as the circumstances of the case would permit; they could not then take them away, because they were at that time under an attachment. After the mark was put on them, they were no longer in transitu; and consequently the plaintiffs' right to seize them was devested. So, where a quantity of goods were ordered of the defendants at Manchester, to be forwarded to the bankrupt's agent at Hull for the purpose of being shipped to the correspondents of the bankrupt at Hamburg. When the goods arrived at Hull, they were absolutely at the bankrupt's disposal, and the agent received orders from him as to their their ulterior destination. Under these circumstances the transitus was holden to be complete upon the arrival of the goods at the agent's at Hull, since that was their ultimate place of destination, as between the bankrupt and the defendants; for, until the agent received directions from the bankrupt, he did not know where to send the goods. *Dixon v. Baldwin*, 5 East,

[ 106r. ]

came necessary for the courts to declare, as they did in

[ 106a. ] 175. So, where the plaintiff, who was a manufacturer at Norwich, agreed with one Shevill for the purchase of several pipes of wine; Shevill wrote to Farquharson, his correspondent in London, to execute the order, who bought the wine of Bamford and Co.' and consigned it to the plaintiff by a vessel employed in the course of trade between Yarmouth and London. When the goods arrived at Yarmouth, the plaintiff's agent took possession of them, but not having room in his own cellar, they were removed into the defendant's, who was paid warehouse room by the plaintiff. Two days afterwards the plaintiff came to Yarmouth, tasted the wines, and took samples of them, but Bamford and Co. discovering Farquharson to be a swindler, and a man of no property, they stopped the goods, and obtained possession of them by giving the defendant an indemnity. On the part of the defendants it was contended, that the transitus must be deemed to be continuing until the goods reached the plaintiff's residence at Norwich, and was not complete by the delivery at Yarmouth. Lord Kenyon, C. J., however, was of opinion that there was no ground for considering the goods in transitu, and that the delivery to the plaintiff's agent at Yarmouth, according to the bill of lading, was a sufficient delivery to support an action against the plaintiff for goods sold and delivered. His Lordship observed, "I once said, that, to confer a property on the consignee, a corporal touch was necessary. I wish the expression had never been used, as it says too much; but here, if a corporal touch was necessary to confer a property on the consignee, it had taken place; but all that is necessary is, that the consignee exercise some act of ownership on the property consigned to him; and he has done so here: he has paid for the warehouse room; he has tasted and taken sample of the wines." *Wright v. Lawes*, 4 Esp. 82. See *Mills v. Ball*, 2 Bos. and P. 457. ante 106 l. n.

A delivery to a packer or wharfinger for the purpose of forwarding the goods to the consignee in cases where he may be considered as a middle man, will not deprive the consignor of



the reign of JAMES I., that a *common hoyman*, like a

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the right of stopping the goods in transitu, but where the consignee has no warehouse of his own, and uses the warehouse of the packer or wharfinger for that purpose, the transitus will be considered to be determined upon the arrival of the goods at such warehouse.

In the case of *Leeds and another v. Wright*, 3 Bos. and Pul. 320., it appeared that the goods in question were purchased of the plaintiffs at Manchester, by one Moisseron (who was the general agent in London of the house of Le Grand and Co. of Paris) in the name of that house; that by Moisseron's directions [ 106t. they were sent for him to the house of the defendant in London, who was a packer, and arrived there on the 3d of September; that upon their arrival there, Moisseron came to the defendant's house, and had some of the goods unpacked and sent away, and the remainder repacked; that on the 7th of September, while the goods so repacked remained in the house of the defendant, news arrived that the house of Le Grand and Co. at Paris, had failed; upon which the plaintiffs tendered to the defendant his charges upon the goods, and required that they should be delivered up to them. It also appeared that Moisseron had a general power, either to send the goods to Le Grand and Co. at Paris, or to Holland, Germany, or such other market as he should think most beneficial. The delivery, under these circumstances, not on the account of Le Grand and Co., but on that of Moisseron, was holden to be a delivery to the latter, and that consequently the plaintiffs had no right to stop them in transitu. See *Dixon v. Baldwin*, 5 East, 186. So, where the goods in question had been ordered by the bankrupt, who was a merchant in London, of persons resident at Manchester, and were sent directed to him at the inn in London. Upon the arrival of the goods, they were sent to the defendant's house, who was a packer, not in consequence of any order respecting those particular goods, but in consequence of a general order from the bankrupt to send all goods directed to him to the defendant's house. On the 11th of March, the bankrupt, who lived in lodg-

common *waggoner*, is responsible for goods committed

ings, and had no warehouse of his own, absconded, leaving no clerk to accept goods or orders for him. On the arrival of the goods at the defendant's house, they were booked for the account of the bankrupt; and the defendant, not knowing that the bankrupt had then absconded, and not having any directions respecting the goods, caused them to be unpacked, with a view to ascertain of what they consisted. On the 31st of March, the consignors having learned the situation of the bankrupt's affairs, claimed the goods from the defendant, and on the day after they were demanded by the assignees. The defendants, being indemnified by the consignors, refused to deliver the goods to the plaintiffs. Lord Alvanley, C. J., recognizing the opinion of [ 106v ] Chambre, J., in *Richardson v. Goss*, 3 Bos. and Pul. 127., that if a person be in the habit of using the warehouse of a wharfin-ger as his own, and make that the repository of his goods, the transitus will be at an end when the goods arrive at such ware-house, decided, in concurrence with the other judges, that the plaintiffs were not entitled to stop the goods in transitu, since, if the delivery at the warehouse of the packer were not to be considered as the place of delivery to the bankrupt, there could be no delivery at all. *Scott v. Pettit*, 3 Bos. and Pul. 469. See 3 East, 185. where these cases are recognized by Lord Ellenborough, C. J., delivering the judgment of the court. So, where a trader in London was in the habit of purchasing goods at Manchester, and exporting them to the continent soon after their arrival in London; but not having any warehouse of his own, they usually remained at the waggon office of the defendant, who was a common carrier, until they were taken away for the purpose of being shipped. The goods in question were consigned from Manchester for the purpose of exportation, and upon their arrival at the defendant's waggon office, the consignee's clerk called and gave directions respecting them. Afterwards, the agent of the consignor gave notice to the defendant not to deliver the goods to the assignee of the consignee, and the defendant subsequently delivered them to the consignor's agent.

to his custody, even if he be robbed of them;(g) but

(g) Hob. ca. 30. 2 Cro. 330. Rich and Kneeland. "The first case of this kind," said Lord Holt, "to be found in our books." 12 Mod. 480.

In an action by the assignee of the consignee for the value of the goods, the court, relying on the above decisions of *Leeds v. Wright*, and *Scott v. Pettit*, decided that the transitus was at an end upon the arrival of the goods at the defendant's waggon office. *Rowe v. Pickford*, 8 Taunt. 83. See *Loeschman v. Williams*, 4 Camp. 181.

The right of stoppage in transitu must not only be exercised before the goods come to the possession of the consignee, but before the rights of third persons have intervened by a bona fide endorsement of the bill of lading. Where the goods are deliverable to the order of the consignee, an endorsement of the bill of lading for a valuable consideration, bona fide, without notice by the endorsee of such circumstances, as would render the bill of lading not fairly and honestly assignable, will deprive the vendor of this right. *Lickbarrow v. Mason*, 2 T. R. 63. 1 Hen Blk 357. See the learned opinion of Mr. Justice Buller, delivered in the House of Lords, 6 East, 21. n. 9 East, 516. [ 107 ] *Haille v. Smith*, 1 Bos. and Pul. 563. *Coxe v. Lumsden*, Peake N. P. C. 189. A contrary rule would enable the consignee to commit a fraud upon an innocent third person, by means of the bill of lading, which makes him ostensible owner of the property. See *Solomons v. Nissen*, 2 T. R. 680. The legal title of the endorsee, however, may be impeached on the ground of fraud or collusion. *Wright v. Campbell*, 4 Burr. 2046. 1 Blk. Rep. 628. *Solomons v. Nissen*, 2 T. R. 674. And where the bill of lading was assigned over as a security for acceptances given by the assignee, not amounting to the value of the goods, and afterwards by an agreement between him and the consignee, by which it appeared that the consignor had not been paid for them, and that they were to become partners in the goods, the endorsement under such circumstances was holden not sufficient to destroy the vendor's right. *Solomons v. Nissen*, 2 T. R. 674. So, an endorsement for a valuable consideration to a third

In what cases the right is taken away.

the reason said to have been given for this judgment,

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person, with notice of the insolvency of the consignee, will not deprive the consignor of the right. *Virtue v. Jewell*, 4 Camp. 31. But the mere knowledge that the goods have not been paid for in money, but by bills of exchange accepted by the consignee payable at a future day, not then arrived, is not of itself a sufficient ground to impeach the endorsee's title. *Cummins v. Brown*, 9 East, 506. See *Coxe v. Harden*, 4 East, 211. *Ogle v. Atkinson*, 1 Marsh. 328. As a factor cannot pledge the goods of his principal by a delivery of the goods themselves, so neither can he do so by an endorsement and delivery of the bill of lading, and consequently the right of the principal to stop them in transitu will not be affected by such a transfer. *Newsom v. Thornton*, 6 East, 17.

[ 107a. ] A receipt for the delivery of goods on board a vessel, acknowledging them to be received for and on account of the sellers, will preserve their right over the goods, and if the captain improperly sign a bill of lading to the buyer, who again-sells, and receives payment for them, the original seller will be entitled to stop the goods in transitu while in the captain's possession; for, retaining the lighterman's receipt, they had never parted with their controul over the property. *Craven v. Ryder*, 6 Taun. 434. So, where the consignor shipped a quantity of barley on his own account, on board the defendant's vessels, and endorsed the bill of lading to his factor in London, to whom at that time he was indebted upon the balance of accounts including bills which were then running, but not afterwards paid, to a greater amount than the value of the barley; the factor afterwards endorsed the bill to a person whom he was legally indebted to, and who was aware of the factor's insolvency at the time of the endorsement. In this case, the right of the consignor to stop the goods in transitu, was holden not to exist, as the factor was to be considered the purchaser of the goods for a valuable consideration, and therefore the endorsement of a bill of lading to the factor under the above circum-

namely; because *he had his hire*, is not the true one;

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stances, vested the property absolutely in him, unaffected by the subsequent non-payment of the bills. *Virtue v. Jewell*, 4 Camp. 31.

The endorsement of the bill of lading is not absolutely necessary for the purpose of divesting the consignor of his right; particular circumstances may exist which will be equivalent to such endorsement, and destroy the right of stoppage in transitu.

A merchant in Ireland, having shipped for London a quantity of provisions, on board the defendant's vessel, sent the bill of lading to his factor at that place, not endorsed, but with their names written on the back. The factors having effected an insurance according to their instructions, wrote to their principal for an endorsement of the bill of lading, who replied in answer, that if the bill was not endorsed, that it was a mistake, and that they would send an endorsement. The consignor had drawn bills of exchange upon the factor, which upon his not being able to pay, were taken up by the plaintiff, for the honour of the consignor, who was largely indebted to him in other respects. The plaintiff having knowledge of the above circumstances, obtained from the consignor an endorsement of the bill of lading, and demanded possession of the goods from the defendant. But Lord Kenyon decided, that the plaintiff had no right to take the goods out of the possession of the persons to whom the factor had transferred them, and that though between persons ignorant of the transaction, an endorsement is the only transfer; yet where parties know the whole of the circumstances, a letter of the above kind is a sufficient transfer of the property. *Dick v. Lumsden, Peake*, N. P. C. 189. See *Nix v. Olive*, before Lord Ellenborough, C. J. after T. T. 1805. *Abbott on Shipping*, 403. 4 Ed. So if the purchaser of goods, to be paid for by bill, after giving his acceptance during the time of credit, and while the goods are in transitu, sells them to a third person for a valuable consideration, without transferring any bill of lading to him, the right of the original vendor to stop the goods in transitu is taken away. *Davis v. Reynolds*, 4 Camp. 267.

[ 107b. ]

since, as we have before suggested, the *recompense* could

Remedies  
against a car-  
rier.

The ordinary remedies against a carrier, for the loss or injury of goods, are an action of assumpsit, or upon the case; and where the carrier has been guilty of a misfeasance, which amounts to a conversion, an action of trover is maintainable. The two former of these actions are of similar application, and by varying the mode of considering the injury, either as the non-performance of a contract, or as a breach of duty, are in general applicable to the same cause of action. But very different consequences result from the adoption of the one or the other, both in the form of the pleadings, and the nature of the evidence.

Assumpsit.

The action of assumpsit is an established mode of declaring, and is in effect the same as a declaration upon the custom of the realm. *Dale v. Hall*, 1 Wils. 281. In adopting this course, and considering the transaction as constituting a contract between the parties, the general principles which govern that form of action, become applicable; and as incident thereto, the plaintiff has the advantage of joining the common counts, if he has other causes of action to which they are applicable. On the other hand, the plaintiff is bound to sue all the parties, who are jointly liable, or the defendant may plead in abatement. *Govett v. Radnidge*, 3 East, 62. 1 Wms.'s Saund. 291. 1. b. n. 4. and must prove at the trial a joint liability in all the persons whom he has sued, or advantage may be taken of that omission under the general issue; for the contract must be proved as stated, and the proof of a contract with A. and B. will not support a contract stated to be made with A. B. and C. See *Wilsford v. Wood*, 1 Esp. N. P. C. 182. 1 Wms.'s Saund. 291. b. n. 4. *Max v. Roberts*, 2 N. R. 454. In

107c. ] this form the plaintiff will also be precluded from joining a count in trover. Assumpsit is maintainable when the cause of action consists in a misfeasance, as where the carrier, instead of conveying the parcel according to his engagement, transfers it to another carrier for that purpose, whereby it is lost. *Sleat v. Fagg*, 5 B. and A. 349. See ante, 105-h. n.

Case.

Many of the disadvantages under which the plaintiff labours, by bringing an action of assumpsit, are avoided by adopting an

only make him liable for *temerity* and *imprudence*; as if

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action upon the case, and some advantages are also obtained which are peculiar to an action arising *ex delicto*. By bringing an action upon the case, a count in trover may be added, where that form is applicable, *vide post*, 107 f. n. The defendant will be ousted of his plea in abatement on the ground of not joining all the parties; and where there are several defendants, the plaintiff will be entitled to a verdict, if some are found guilty, although others are acquitted.

With respect, however, to an action upon the case, when founded substantially upon a contract, much diversity of opinion has prevailed as to the real nature of the action, whether it is to be considered as an action *ex delicto*, and to be governed by the rules which regulate that form of action, or quasi *ex contractu*, and subject to the same rules as an action of *assumpsit*, or other action founded upon a contract. See *Powell v. Layton*, 2 Bos. and Pul. N. R. 365. *Weal v. King*, 12 East, 452. and cases *infra*.

In an action upon the case, against two of four joint owners of a vessel, for a breach of duty in the carriage of goods, which the defendants had undertaken to carry for a reasonable freight to be therefore paid, the court were of opinion that this was not an action *ex delicto*, but quasi *ex contractu*, and gave judgment for the defendant, because all the owners were not joined. *Boson v. Sandford*, Skinn. 278. 3 Mod. 321. Carth. 58. 3 Lev. 258. Salk. 440. 1 Show. 29. 101. 2 Show. 478. S. C. The form of action adopted in this case, whether in case or *assumpsit*, has been differently represented upon different occasions, see *Buddle v. Wilson*, 6 T. R. 369. *Govett v. Radnidge*, 3 East, 69. and its authority has been impeached upon the ground that the judges by whom it was determined, went upon a false assumption; that the non-joinder of other parties who were liable, could not be pleaded in abatement. *Per de Grey, C. J.* in *Abbott v. Smith*, 2 Blac. 947. *Govett v. Radnidge*, *infra*. but is supported in the case of *Powell v. Layton*, 2 Bos and Pul. N. R. 372. So, in the last mentioned case of *Powell v. Layton*,

[ 107d. ]

a bargemaster were rashly to shoot a bridge, *when the*

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which was an action against one of several joint owners of a ship, for a breach of duty, in not delivering goods which they had accepted to carry for a reward, the declaration was decided to be founded on contract, and that the defendant might plead in abatement, that the goods were delivered to him and his partners jointly, and that his partners were not sued. And in a subsequent case, where the action was brought against nine defendants, joint owners of the vessel, on board of which the goods had been delivered, consigned to the plaintiff, the declaration alleged a delivery of the goods to be carried for freight, and a breach of duty in making a deviation during the course of the voyage, by which the plaintiff lost the benefit of a policy of insurance. It appeared in evidence, by the ship's register, that only eight of the defendants were owners, and that one of them had afterwards married the ninth. A verdict having been found for the plaintiff, the court made a rule absolute for entering a non-suit, upon the ground that the action was founded in contract, and that the plaintiff was not entitled to recover, because he had not proved all the defendants to be liable. *Max v. Roberts*, 2 Bos. and Pul. N. R. 454. 12 East, 89. S. C. But in an action against three defendants, wherein the plaintiff declared that they had the loading of a certain hogshead of treacle, for a reasonable reward, to be therefore paid to two of them, and a certain other reward to the other, and that the defendants so negligently conducted themselves that the hogshead was lost, a verdict having been found for two of the defendants, and against the other, it was insisted upon motion in arrest of judgment, that the cause of action being founded in contract, or arising at least quasi ex contractu, the finding of not guilty as to two of the defendants, negatived the existence of a joint contract, which must be proved, if the action were founded in contract, and that the plaintiff was not entitled to judgment upon the record. But the court, upon the authority of the case of *Dickon v. Clifton*, 4 Wils. 319. which contained a similar count, and was joined with a count in trover, over-



*bent of the weather is tempestuous: but not for a mere*

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ruled the objection. "What inconvenience is there," observes Lord Ellenborough, C. J. in delivering the judgment of the court, "in suffering the party to allege his gravamen, if he please, as consisting in a breach of duty arising out of an employment for hire, and to consider that breach of duty as tortious negligence, instead of considering the same circumstances as forming a breach of promise, implied from the same consideration of hire? By allowing it to be considered in either way, according as the neglect of duty or the breach of promise is relied upon as the injury, a multiplicity of actions is avoided; and the plaintiff, according as the convenience of the case requires, frames his principal count in such a manner, as either to join a count in trover therewith, if he have another cause of action for the consideration of the court, other than the action of assumpsit; or to join with the assumpsit the common counts, if he have another cause of action to which they are applicable." *Govett v. Radnidge*, 3 East, 69. See *Cowper v. South*, 4 Taun. 802.

And in a late case, in which the declaration was framed upon a neglect of duty, and not for the breach of an undertaking, the action was brought against ten defendants, who were the proprietors of a stage coach, in which the plaintiff had been a passenger, and was injured by the upsetting of the coach, through the negligence of the defendant's driver. A verdict having been found against eight of the defendants, and in favour of the other two, a writ of Error was brought into the Exchequer Chamber. On behalf of the plaintiffs in error, it was contended, upon the authority of the cases of *Powell v. Layton*, 2 N. R. 365. *Weal v. King*, 12 East, 452. *Green v. Greenbank*, 2 Marsh. 485. *Boson v. Sanford*, ante, 107c. and *Dale v. Hall*, 1 Wils. 281. that the cause of action being founded substantially upon a contract, was subject to all the incidents of an action upon a contract, and that, consequently, the plaintiff was bound to prove a joint liability in all the defendants. But the court considering that the action was founded upon a misfea-

*casualty*, as if a hoy in a good condition, shooting a bridge

sance, and the declaration framed accordingly, decided that the verdict and judgment against some of the defendants was not erroneous, and affirmed the judgment of the Court of King's Bench. *Brotherton v. Wood*, 3 Bro. and B. 54. [See the report of this case in *Exchequer*, 9 Price's Rep. 408.] See 3 Bro. and Bing. 174.

[In an action of trespass on the case against a common carrier, if it appear by a bill of exceptions, that the defendant *fraudulently* opened certain packages and casks being in his care, and belonging to the plaintiff, took therefrom a part of the contents, and converted the same to his own use, but not that the said contents were *feloniously* carried away, such offence is considered as amounting to a trespass only. *Cook v. Darby*, 4 Munf. Rep. 444.]

[ 107f. ]  
Trove.

Where the action is framed in case for a breach of duty, and not in terms of contract, a count in trover may be joined. In the case of *Dickon v. Clifton*, 2 Wils. 319. where the action was framed in this way, for negligence and misfeasance, with which a count in trover was joined, an objection was made upon motion in arrest of judgment, that these counts could not be joined, but was overruled by the court. Lord Chief Justice Wilmot observed, "I own, that in many books it is reported, that "trover, and a count against a common carrier, cannot be "joined, but common experience and practice is now to the "contrary;" and Lord Ellenborough, C. J. in *Govett v. Radnidge*, 3 East, 69. recognizing this observation, added, "that "when the counts were framed in this manner, it was then the "daily, and well warranted practice, to join them."

To sustain this count a conversion, which is an essential ingredient to the maintenance of this form of action, must be proved; it may, therefore, be useful to observe the nature of this act, and its qualities. A conversion is a misfeasance, consisting in the commission of a tortious act, and may be defined to be the wrongful assumption of the right of ownership over property, to the prejudice of the true owner. *Ross v. Johnson*,

*at a proper time, were driven against a pier by a sudden*

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5 Burr. 2826. *M'Combie v. Davies*, 6 East, 540. *Bromley v. Coxwell*, 2 Bos. and Pul. 439. Where the act relied upon decidedly indicates this assumption of ownership, it will of itself amount to a conversion. Thus, where one person assumes to himself the property and right of disposing of another man's goods. Per Holt, C. J. in *Baldwin v. Cole*, 6 Mod. 212. recognized by Lord Ellenborough, C. J. in *M'Combie v. Davies*, 6 East, 540. As by the actual destruction of property. Per Abbott, C. J. in *Keyworth v. Hill*, 3 Barn. and Ald. 687. Or obtaining possession of it by compulsion, under a void legal process. *Summersett v. Jarvis*, 3 Bro. and B. 2. So, taking property by assignment from one who has no authority to transfer it, as when a factor without authority pledges goods with which he is entrusted to sell. *M'Combie v. Davies*, 6 East, 540. or goods are sold by a person having no authority to dispose of them, and this will be a conversion, both in the seller and the buyer, unless he has purchased the goods in market overt bona fide, and without the knowledge of imperfection in the seller's title. *Freeman v. East India Company*, 1 Dowling and Ryl. 234. To apply these general principles to our present subject, it has been holden, in the case of a carrier, that if he draw out part of the vessel and fill it up with water, it is a conversion of all the liquor. *Richardson v. Atkinson*, 1 Str. 576. So, trover will lie against a carrier who delivers goods by mistake to a wrong person; for by such delivery he becomes an actor, and is guilty of a conversion, so as to support this action. *Youl v. Harbottle*, Peake's N. P. C. 49. cited by Bailey, J. in *Deveraux v. Barclay*, 2 Barn. and Ald. 704. See *Ross v. Johnson*, 5 Burr. 2827. *Townsend v. Inglis*, Holt, N. P. C. 278. But where the act is not of itself of so decisive a character, other circumstances become requisite to show a conversion, and, for this purpose, a demand and refusal are usually relied upon to make the act complete. The mere non-delivery of goods will not constitute a conversion on the part of the carrier, but, if he has them in his possession, and, upon demand, refuse to

[ 107g. ]

breeze, and overset by the violence of the shock ;(h) nor,

(h) 1 Stra. 128. Amies and Stevens.

deliver them, this will be evidence of a conversion. Salk. 655. *Youl v. Harbottle*, Peake, N. P. C. 50. 1 Camp. 410. So, where a man, entrusted with the goods of another, puts them into the hands of a third person, without orders, and thereby brings a charge upon his employer, it is a conversion ; as, where the owner of goods on board a vessel directed the captain not to land them on the wharf against which the vessel was moored, which he promised not to do, but afterwards delivered them to the wharfinger for the owner's use, under an idea that the wharfinger had a lien upon them for the wharfage fees, because the vessel was unloaded against the wharf ; it was held, that the owner, on demand and refusal, might maintain trover against the captain, unless he could establish the wharfinger's right ; for putting the goods in the custody of the wharfinger brings a charge upon the plaintiff, and is therefore a conversion by the defendant. *Syed's v. Hay*, 4 T. R. 250. See *Smith v. Young*, 1 Camp. 439.

[ 107h. ]

But a demand and refusal is merely evidence of a conversion, and will not have that effect where it appears no conversion has taken place, as in the case of a carrier or wharfinger, where the goods are proved to have been lost through negligence, or stolen ; and therefore trover does not lie in such case, though the owner may have an action upon the case. *Owen v. Lewyn*, 1 Vent. 233. *Anon.* 2 Salk. 655. *Ross v. Johnson*, 5 Burr. 2825. *Buller*, N. P. 44, 45. *Youl v. Harbottle*, Peake's N. P. C. 119. So, if A. send goods by B. a common carrier, to be delivered to C. ; proof that B. asserted he had delivered the goods to C., whereas in truth C. had never received them, is not sufficient evidence of conversion to support trover against B. *Attersol v. Briant*, 1 Camp. 409.

Parties to the action.

The person invested with the legal right to property, is the proper party to sue in a court of justice for an injury to it ; and since a delivery to a carrier, to the order of the buyer, vests the property in him immediately and absolutely, he is the person

by parity of reason for any other force too great to be

who has sustained the loss, if any, by the negligence of the carrier, and is consequently the fit person to call for compensation from the person by whom he has been injured. *Dawes v. Peck*, 8 T. R. 332. *Brown v. Hodgson*, 2 Camp. 36. See ante, 106 b.

In an action brought by the consignor in the case of goods delivered on board a vessel, to be carried from London to Toningen, which were expressed in the bill of lading to be shipped by order and on account of Hesse & Co. of Hamburg; upon an objection to the plaintiff's right to sue, Lord Ellenborough, C. J. observed, "The goods are shipped by order and on account of Hesse & Co. I can recognize no property but that recognized by the bill of lading. This action cannot be maintained." *Brown v. Hodgson*, 2 Camp. 36. See *Sargent v. Morris*, 3 Barn. and Ald. 278. *Dawes v. Peck*, 8 T. R. 330. *Joseph and others v. Knox*, 3 Camp. 320. *Noble v. Adams*, 2 Marsh. 366. 7 Taun. 59, ante, p. 106c. An action in the name of the consignor has been maintained in some cases, upon the ground that he was liable for the price of the carriage. *Davies v. James*, 5 Burr. 2680. *Moore v. Wilson*, 1 T. R. 659. But these cases proceeded on the ground of special agreements between the respective consignors and consignees, and do not affect the general principle. *Dawes v. Peck*, 8 T. R. 330. *King v. Meredith*, 2 Camp. N. P. C. 639.

There are cases, however, in which the consignee may maintain an action against a carrier; as, where a counterfeited order in the name of a third person is fraudulently given to a tradesman, who in consequence delivers the goods to the carrier, directed to the supposed consignee, which are afterwards lost by the carrier, by means of a negligent mis-delivery. In this case the consignee may sue in his own name, since the delivery of the goods to the carrier created no change of property; for there was no sale between the parties which could have transferred it to the consignee, and the delivery being by fraud, could operate no such effect. Per Richardson, J. in *Duff v. Budd*, 3 Bro. and Bing. 184. vide *Berkett v. Willan*, 2 Barn. and Ald. 356.

[ 107i. ]

resisted: (i) the *public* employment of the *hoyman*, and that

(i) Palm. 548. W. Jo. 159. See the doctrine of inevitable accident most learnedly discussed in Desid. Heraldii Animadv. in Salmasii Observ. in Jus Att. et Rom. cap. xv.

Whether the loss or damage arises from the negligence of the carrier, or of his servants, the action should be brought against the carrier. If the driver of a stage-coach, although in fraud of his master, carry goods for hire on his own account, and that fact be known to the person who employs him, the action should be against the driver, and not the master; but if the driver be only a servant, the action must be brought against the master, and him only. This is a general rule, wherever the act of the servant can be considered as the act of the master. Williams v. Cranston, 2 Stark. N. P. C. 82. See Cavenagh v. Such; 1 Price R. 328. Middleton v. Fowler, Salk. 282. Bull. Nisi Prius, 70 b. Bridgeman's ed.

**Declaration.**

In a declaration against a common carrier, it was formerly usual to set out the custom of the realm, 1 Sid. 245. Hearn's Plead. 76. Vid. Ent. 37, 38; but, as this custom is part of the common law, and judicially recognized by the courts, it is not only unnecessary, but is better omitted, because it tends to confound the distinction between special customs, which ought to be pleaded, and the general custom of the realm, of which the courts are bound to take notice without pleading. Per Dennison, J. in Dale v. Hall, 1 Wils. 282. Ca. Temp. Hard. 199. Hargrave's Co. Litt. p. 89. a. n. 7 Hob. 18.

The declaration must allege a duty or contract, and therefore a count in an action upon the case which stated a shipment by the plaintiff of goods on board a vessel of which the defendants were owners, without proceeding to state that the goods were delivered or received by the defendants, so that they had no notice of the fact, is not sufficient. A promise must be alleged, or such circumstances and facts stated, from whence a promise could be implied by the one party to the other, or duty inferred between them in respect to such goods. Max. v. Roberts, 12 East, 89.

[ 107k. ]

*distrust, which an ancient writer justly calls the sinew of*

In the statement of the contract, it must be set forth so as to correspond with the facts proved in evidence, and any material variance will be fatal. *Roskell v. Waterhouse*, 2 Stark, N. P. C. 461. But as a general notice does not constitute a special contract, or in any way qualify the contract itself, it need not be stated upon the record; a declaration in the usual form will, in cases of this description, be sufficient. The proper office of such notice is to limit the province of the jury in the assessment of damages, after a right to them has accrued by a breach of the contract. *Clarke v. Gray*, 6 East, 563. *Smith v. Horne*, 8 Taun. 146.

The termini of the journey must also be accurately stated, for, where the contract was represented in the declaration to be for the conveyance of goods from Whitechapel, in the county of Middlesex, to Thornden, in Essex; when, in fact, it was from Aldgate, in the city of London, to that place, the variance was holden to be fatal. *Tucker v. Cracklin*, 2 Stark. N. P. C. 385. See, in 2 Show. 129, a note by the reporter as to a mis-statement of the terminus ad quem.

Where the demand consists of a sum certain, or capable of being ascertained by mere computation, without leaving any sort of discretion to be exercised by the jury, the defendant will be permitted to pay money into court. *Hallet v. East India Company*, 2 Burr. 1120. *Tidd's Pract.* 5 Ed. p. 620. *Archbold's K. B. Practice*, 2 v. 181. *Hutton v. Bolton*, 1 H. Bl. 299. n. b. In an action of assumpsit against a carrier for the loss of a trunk belonging to the plaintiffs of the value of 50*l.* the defendant was allowed to pay 20*l.* into court, upon an affidavit, which stated, that he had published an advertisement that he would not be responsible for any parcel committed to his care above the value of 20*l.* unless he was paid in proportion to the risk, and that though the goods lost in the present case exceeded that value, yet he was not informed of it, nor paid any thing extraordinary for the carriage. Mr. Justice Buller observed, that "this was an action of assumpsit; and the goods are stated to have been of a specific value. The declaration does not

Payment of  
money into  
court.

[ 107l. ]

*wisdom*, are the real grounds of the law's rigour in making such a person responsible for a loss by *robbery*.

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"state any particular damage or inconvenience in consequence of, and independent of the loss; and therefore the plaintiff cannot recover beyond the value of the goods in question; for which reason the declaration does not differ from the common case of goods sold and delivered." *Hutton v. Bolton*, 1 Hen. Bl. 299. n. b.

But in *assumpsit* to recover the loss sustained upon goods put on board of the defendant's barge, and which had been spoiled, in consequence of the barge being sunk; the defendant was not allowed to pay the invoice price into court. *Fail v. Pickford*, 2 B. and P. 234.

The payment of money into court, generally on the whole declaration, admits the contract as stated in each count, but not the amount of the breach there stated. *Stoveld v. Brewin*, 2 B. and A. 116. *Dyer v. Ashton*, 6 Barn. and Ald. 3. Nor will it be an admission of other parts of the contract, which are distinct and collateral, respecting the liquidation of damages after a right to them has accrued by a breach of the contract. *Clarke v. Gray*, 6 East, 564.

In an action of *assumpsit* against a carrier for the loss of a trunk of the value of 15*l.*, where the declaration stated a general undertaking by the defendants to carry goods for hire, and the defendant paid 5*l.* into court, the defendant was not allowed to give in evidence a notice "that he would not be responsible for more than 5*l.* for any property lost, unless the same was booked and paid for according to the value," on the ground that the notice containing the restriction was a limitation of the contract, which was admitted by the payment of money into court, and reduced the question to the quantum of damages the plaintiff was entitled to recover. *Yate v. Willan*, 2 East, 168. But in the above case of *Clarke v. Gray*, the opinion of the court that the notice operated as an admission of the contract was impeached by the court, and Lord Ellenborough, in delivering judgment, observed, "that the case of *Yate v. Willan* could not



All that has just been advanced concerning a *load*.

"be supported to its full extent; for although the payment of money into court did admit the contract as stated in the declaration, it did not admit a contract incompatible with the restrictive provision, as to the amount of damages to be recovered in case of loss."

The statute of limitations may be pleaded in bar to an action against a common carrier for fraudulently embezzling goods entrusted to his care. *Cook v. Darley*, 4 Munf. Rep. 444. Statute of limitations.

In an action against a carrier for the loss or injury of goods, the plaintiff must prove a delivery to the carrier, or to his servant or agent, so as to charge him with their custody, *vide ante*, p. 103. f. n. And where there is any reason to apprehend that that fact will be disputed, he should also be prepared to prove that the goods were properly packed for the journey. See *Beck v. Evans*, 16 East, 245. But the plaintiff will not be required to prove a property in the goods, for if a carrier receive goods to be carried, he cannot retain them, and put the consignor upon proof of his title to them. Anon. cited and sanctioned by Lord Kenyon, C. J. in *Laclough v. Towle*, 3 Esp. N. P. C. 115. The material averments in the declaration, and also the terms of the contract, must be proved as they are set forth. See *Roskell v. Waterhouse*, 2 Stark. N. P. C. 461. [ 107m. ]  
Evidence on the part of the Plaintiff.

In a case in which it was alleged, that in consideration that the plaintiff, at the instance of the defendant, had caused to be shipped on board his vessel a quantity of wheat to be delivered, for a reasonable reward, at a certain place by a particular day, and that the defendant undertook to deliver it safely, the plaintiff proved the agreement as stated; but it appeared that the agreement was made before all the wheat was delivered. The court, however, decided that the declaration was supported by the evidence. *Streeter v. Horlock*, 1 Bing. 34.

A party who seeks to deprive the carrier of a general notice, must show the particular circumstances upon which he relies for that purpose; for the carrier is not bound to prove that he used reasonable care. *Harris v. Packwood*, 3 Taun. 34. But in

carrier may, therefore, be applied to a *baragemaster* or

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assumpsit in the usual form, evidence of gross neglect is admissible for this purpose, although the declaration contains no such averment, because the notice not constituting a special contract, does not appear on the record, but only arises in defence of the carrier, and therefore it may be rebutted by proof of positive negligence. *Smith v. Horne*, 8 Taun. 144.

[ 107n. ] The entry in the office in Somerset House for licensing stage-coaches, is no evidence to prove that persons named in the license are the owners of the coach. To render such evidence admissible against the coach-master, his signature to the entry, or connection with it in some way or other, must be proved. *Strother v. Willan*, 2 Camp. 24.

On the part of  
the defendant.

A carrier, upon proof of a delivery to him, will be required to show in what manner he has acquitted himself of his engagement, for it is not necessary for the plaintiff to prove negligence, for it is said "every thing is negligence that the law does not excuse." Evidence, therefore, that the loss is not attributable to negligence, on the carrier's part, is inadmissible, for since he is responsible in all cases, except injuries resulting from the act of God, or of the King's enemies, all other causes amounting to negligence not being legal excuses, evidence of them is immaterial, as not being an answer to the undertaking. *Dale v. Hall*, 1 Wils. 281. The communication of a notice may be proved by the person by whom it was made, or by the proof of those circumstances from whence a knowledge of its contents may be inferred, vide ante. p. 104 h. and see also p. 106 as to the proof of a right of lien for a general balance. A general notice written upon a board which is inlaid in a wall, may be proved by an examined copy. *Cobden v. Bolton*, 2 Camp. 108. n.

[A usage or custom, varying the liability of common carriers by water, from that of the common law, may be proved. *Walker v. Little*, 8 Serg. & Raw. 533. But in an action against a common carrier by water, to recover damages for the loss of the plaintiff's goods, where the defence is, that carriers by water are, by the custom of the country; answerable for such losses only

*boatman* ; but, in case of a tempest, it may sometimes

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as are occasioned by their own negligence, the defendant cannot give in evidence, that in a case in which the plaintiff had carried the property of others, he had refused to make compensation for a loss. *Dean v Swoop*, 2 Binney Rep. 72.]

A party interested in the establishment of a particular fact, will not in general be admitted to prove it; but among others, an exception in favour of trade has been allowed. "A party interested will be admitted for the sake of trade and the common usage of business, therefore a porter shall be evidence to prove a delivery of goods." Bull. Nisi Prius, 289. *Theobald v. Tregott*, 11 Mod. 262. A servant consequently is a good witness to prove a delivery of goods to a carrier. See *Buckman v. Levi*, 4 Camp. 414. So a book-keeper to a carrier is a good witness for him, of necessity, without a release, to prove the delivery of a parcel. *Spencer v. Goulding, Peake*, N. P. C. 129. But a promise by him to make compensation for a parcel which had been lost, is not binding upon the carrier, without proving that he was his general agent. *Olive v. Eames*, 2 Stark. N. P. C. 181.

A servant is not a competent witness in an action against his master, to disprove the fact of his negligence, and, therefore, the driver of a coach, or the master of a vessel, are not admissible on the part of the owner for that purpose, because the servant is interested to defeat the action, since a verdict against the master might be given in evidence in an action by him against the servant as to the quantum of damages. *Green v. The New River Company*, 4 T. R. 589. *Bird v. Thompson*, 1 Esp. N. P. C. 339. 6 Esp. N. P. C. 73 *Phillips' Evidence*, 00. 3 ed. In cases of this description, the servant must be released by the master before his evidence can be received. Per *Lee, C. J.*, in *Jervis v Hayes*, 2 Str. 1083. *Miller v. Falconer*, 1 Camp. N. P. C. 251., but a release by one of several joint owners of a vessel will be sufficient for the action against the captain for negligence must be joint; in which case a release by one would be

[ 107o. ]

happen that the law of *jetson* and *average* may occasion

pleadable in bar to the joint action. *Hockless v. Mitchell*, 4 Esp. N. P. C. 86.

In an action on the case for managing the defendant's vessel so negligently that it ran down the plaintiff's barge, the declaration set forth that he was possessed of the said barge, laden with divers goods and merchandizes, and Holt, C. J. would not suffer the pilot to be a witness, because he was answerable, if faulty in steering, to the master; nor would he suffer any damages to be recovered for the goods because they were not properly set forth. *Martyn v. Hendrickson*, 1 Salk. 287. So, in an action on a policy of insurance on the plaintiff's goods, the owner of the vessel is not a competent witness, without a release, to prove that the vessel was staunch and sea-worthy, for otherwise he would be liable on his implied warranty that the vessel was staunch, and therefore he comes to exonerate himself. *Rotheroe v. Elton, Peake*, N. P. C. 84. But, in an action against the owner of a vessel for not safely carrying corn, the plaintiff called the master to prove that the injury arose on account of the vessel not being sea-worthy; Lord Kenyon, C. J. admitted him, observing, that the witness had no immediate interest; the record in this cause would not be evidence for or against him; and, if it should turn out that the ship was lost by the negligence of the master, still the present defendant is liable to the plaintiff; therefore, taking it either way, he is a witness. Lay v. Holock, Peake, N. P. C. 101. And, in an action for sinking a barge, on board of which the plaintiff had a cargo of corn, the master may be a witness upon being released, to prove negligence on the defendant's part, because the record in this cause would not be evidence for the master in an action against the defendant for the injury done to the barge. *Spitty v. Bowen, Peake*, N. P. C. 53.

A carrier, employed by A. to carry a sum of money to B. and then the like sum to C., in an action for money had and received by A. against C., is a good witness from necessity, without a release, to prove that by mistake he delivered the first

a difference, *Barcroft's* case, as it is cited by Chief

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sum to C. as well as the second. *Barker v. Macrae*, 3 Camp, 144.

[*Damages*.—In an action against a carrier by water, the value of the goods at the port of reception is the proper measure of damages, unless some fault or misconduct on the part of the carrier should require the application of a different rule. *Edminson v. Baxter*, 4 Hayw. Rep. 114.]

(2) No distinction exists between a carrier by land, and a carrier by water, as to the general nature of their duties, or the degree of responsibility exacted in the performance of them. As these have been pointed out in the preceding note, at some length, it will be unnecessary to observe upon them in this place; but the different nature of the element upon which those duties are performed, in the case of a carrier by water, necessarily vary them in some degree, and their responsibility has also, in various instances, been limited by several acts of parliament.

In every contract for the carriage of goods between a person holding himself forth as the owner of a lighter or vessel ready to carry goods for hire, and the person putting goods on board, or employing the vessel or lighter for that purpose, it is a term of the contract on the part of the carrier or lighterman, implied by law, that his vessel is tight and fit for the purpose or employment for which he offers, and holds it forth to the public; and the owner will, consequently, be liable for any loss arising from a breach of this implied undertaking. *Lyon v. Mills*, 5 East, 427. See *Ellis v. Turner*, 8 T. R. 531. ante, p. 105 b. *Abbott on Shipping*, 231. 4th Ed.

The several acts of parliament by which the responsibility of a carrier by water has been restricted are, first, by 7 Geo. II. c. 15. passed for the encouragement of shipping, whereby, after reciting the liability of the owners of vessels for the loss of goods shipped on board their vessels, although the loss was occasioned by the master or mariners, without the knowledge or privity of the owners, it is enacted, by the first section, "that the owners [ 107q. ]

"shall not be liable for any loss or damage, by reason of any

Justice *Rolle*, has some appearance of hardship: "a

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"embezzlement, secreting, or making away with (by the master or mariners) of any goods shipped on board any vessel, or for any act, matter, or thing, damage, or forfeiture done, occasioned, or incurred by the master or mariners, further than the value of the vessel, with her appurtenances and freight for the voyage, wherein the embezzlement, &c. shall be made." But, by the fourth section, it is provided, that the act shall not extend to lessen the remedy which any person may have against the master and mariners, for any embezzlement, secreting, or making away with, any merchandise, or on account of any fraud, abuse, or malversation, in the master and mariners respectively.

[ 107q. ]

Under this statute the owner of a ship is not liable beyond the value of the ship and freight, in the case of a robbery in which one of the mariners is concerned by giving intelligence, and afterwards sharing the spoil. In an action against a common carrier to recover the value of a large quantity of dollars, shipped by the plaintiff on board a vessel bound from London for Ham-  
burgh, which, during the night, were taken by force from on board the ship by a number of fresh-water pirates, as she lay at anchor in the Thames, evidence was offered to prove that one of the mariners was accessory in the robbery by giving intelligence; but the former part of the above clause alone being relied upon, at the trial of the cause, Lord Mansfield was of opinion, that the word embezzlement was not broad enough to cover this transaction; and therefore he directed the jury to find for the plaintiff to the whole amount of the dollars. Upon application for a new trial, however, the plaintiff relying upon the latter part of the clause, Lord Mansfield, C. J., thought the words of the act were sufficiently comprehensive to include this matter. Mr. Justice Buller observed, "This act is as strong as possible, and was meant to protect the owner against all treachery in the master or mariners, as appears from the clause in question, as well as the preamble of the act. It meant to relieve the owners of ships from hardships, and to encourage them; at the same time saying, that so far as you have trusted the master

“ box of *jewels* had been delivered to a ferryman, who

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“ and mariners yourself. so far shall you be answerable ; which  
“ is to the value of the ship and freight.” Sutton v. Mitchell, 1  
T. R. 18.

A more extensive limitation upon this responsibility is conferred by stat. 26 Geo. III. c. 86. s. 1. by which the owners of vessels are further protected from any loss or damage by reason of any robbery, embezzlement, secreting, or making away with, any gold, silver, diamonds, jewels, precious stones, or other goods, or merchandize, or for any act, matter or thing, damage or forfeiture, occasioned without the privity and knowledge of the owners, further than the value of the ship with all her appurtenances, and the full amount of the freight due, or to grow due during the voyage, although the master or mariners may be concerned in and privy to the loss. By the second section, the owners of vessels are entirely exempted from answering for any loss by fire. And by the third section, “ The owners  
“ of vessels shall not be liable for any loss happening to gold,  
“ silver, diamonds, watches, jewels, or precious stones, by reason of any robbery, embezzlement, making away with, or secreting thereof, unless the owner or shipper, at the time of  
“ shipping, insert in the bill of lading, or otherwise declare in  
“ writing to the master or owner of the vessel, the nature,  
“ quality, and value, of such gold, &c.” The fifth section also contains a provision against diminishing the remedy against the master and mariners for any loss arising from any fraud, abuse, or malversation in them respectively.

And by statute 53 Geo III. c. 159. reciting the two former statutes, it is provided by the first section, “ That the owners of  
“ vessels shall not be liable to answer for any loss or damage arising by reason of any act, neglect, matter or thing done, omitted or occasioned without the fault or privity of the owners,  
“ which may happen to any goods, or merchandize, or other  
“ things laden on board the same ship or vessel, or which may happen to any other ship or vessel, or to any goods, wares, merchandize, or other things being in or on board of any other

*"knew not what it contained, and a sudden storm arising in the passage, he threw the box into the sea; yet it was resolved that he should answer for it;"* (k) now I

(k) All. 32.

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"ship or vessel, further than the value of the ship or vessel, and the freight due or to "grow due during the voyage." By the second section, "The value of the carriage of goods belonging to the owners of the vessel, and also the hire due or to grow due by reason of any contract, except only such hire as in the case of a vessel hired for time, may not begin to be earned until the expiration of six calendar months after the happening of such loss or damage, shall be deemed and taken to be, and shall be considered as freight within the extent of this and the two preceding acts." The fourth section contains a provision against lessening the liability of the master and mariners. And the fifth, that the act shall not extend to lighters or vessels used solely in inland navigation, or any ship or vessel not duly registered according to law. The act also contains various regulations with respect to the mode of proceeding, in case the value of the ship, and the appurtenances are not sufficient to make compensation for damages.

In an action against several defendants as ship-owners, for damage sustained by the loss of goods laden on board their ship, it was holden, under the first section of the above statute, that they were not liable in that character beyond the value of the ship and freight due or to grow due, although the loss was occasioned by the misconduct of one of the defendants, who was both master and part-owner. It was also decided in the same case, that in estimating the value of the ship, the calculation is to be made at the time of the loss, and not at the time of the commencement of the voyage. And that the words "freight due or to grow due" comprehend all the freight for the voyage, and that it makes no difference whether freight is paid in advance or not, and, therefore, in calculating the value of the freight, money actually paid in advance must be included. *Wilson v. Dickson and others*, 2 Barn. and Ald. 2.



cannot help suspecting, that there was proof in this case of *culpable negligence*, and probably the casket was both *small* and *light* enough to have been kept longer on board than other goods; for in the case of *Gravesend* barge, cited on the bench by Lord *Coke*, it appears, that the pack which was thrown overboard in a tempest, and for which the bargeman was holden *not answerable*, was of great value and great weight; although this last circumstance be omitted by *Rolle*, who says only, that the master of the vessel had *no information of its contents*.<sup>(l)</sup>

The subtilty of the human mind, in finding distinctions, has no bounds; and it was imagined by some, that, whatever might be the obligation of a *barge-master*, there was no reason to be equally rigorous in regard to the master of a *ship*: who, if he carry goods for *profit* must indubitably answer for the *ordinary neglect* of himself or his mariners, but ought not, they said, to be chargeable for the violence of *robbers*; it was, however, otherwise decided in the great case of *Mors* and *Slew*, where “eleven persons armed came on board the “ship in the river, under pretence of *impressing seamen*, “and forcibly took the chests which the defendant had “engaged to carry;” and though the master was entirely blameless, yet Sir *Matthew Hale* and his brethren, having heard both civilians and common lawyers, and, among them, Mr. *HOLT* for the plaintiff, determined, on the principles just before established, that the bailor ought to recover.<sup>(m)</sup> This case was frequently mentioned afterwards by Lord *Holt*, who said, that “the “declaration was drawn by the greatest pleader in *Eng-* “land of his time.”<sup>(n)</sup>

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(l) 2 Bulstr. 280. 2 Ro. Abr. 567.

(m) 1 Ventr. 190. 238. Raym. 220.

(n) Ld. Raym. 920.

Still farther ; since neither the *element*, on which the goods are carried, nor the *magnitude* and *form* of the carriage, make any difference in the responsibility of the bailee, one would hardly have conceived, that a diversity could have been taken between a *letter* and any other thing. Our *common law*, indeed, was acquainted with no such diversity ; and a *private* post-master was precisely in the situation of another carrier ; but the statute of CHARLES II. having established a *general* post-office, and taken away the liberty of sending letters by a *private* post,<sup>(o)</sup> it was thought that an alteration was made in the obligation of the post-master *general* : and in the case of *Lane* and *Cotton*, three judges determined, against the fixed and well-supported opinion of Chief Justice HOLT, “ that the post-master was *not* answerable for the loss of a letter with exchequer bills in it :”<sup>(p)</sup> now this was a case of *ordinary* neglect, for the bills were *stolen* out of the plaintiff’s letter in the *defendant’s* office ;<sup>(q)</sup> and as the master has a great *salary* for the discharge of his trust ; as he ought clearly to answer

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Case of Lane  
and Cotton.

(o) 12 Cha. II. ch. 35 See the subsequent statutes.

(p) Carth. 487. 12 Mod. 482. (3)

(q) In addition to the authorities before cited, p. 44. n.,<sup>(o)</sup> for the distinction between a loss by stealth and by robbery, see Dumoulin, tract. De eo quod interest, n. 184. and Rosella casuum, 28. b. This last is the book which St. German improperly calls Summa Rosella, and by misquoting which he misled me in the passage concerning the fall of a house, p. 68 ; The words of the author, Trovamaia. are these ; “ Domus tua minabatur ruinam ; “ domus corrui, et intericit equum tibi commodatum ; certe non-  
“ propterea dici casus fortuitus, quia diligentissimus reparasset domum, vel  
“ ibi non habitasset, si autem domus non minabatur ruinam, sed impetu  
“ tempestatis validae corrui, non est tibi imputandum.”

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(3) 1 Ld. Raym. 646. S. C. See also Whitfield v. Lord Le Despencer, Cowper, 754. where the decision in Lane v. Cotton is confirmed ; and where it is settled, that no action of the kind

for the acts of his clerks and agents; as the statute, professedly enacted for *safety* as well as *despatch*, could not have been intended to deprive the subject of any benefit which he before enjoyed; for these reasons, and for many others, I believe that *Cicero* would have said what he wrote on a similar occasion to *Trebatius*, "*Ego tamen SCÆVOLÆ assentior.*"<sup>(r)</sup> It would, perhaps, have been different *under the statute*, if the post had been *robbed* either by day or by *night*, when there is a necessity of travelling, but even that question would have been disputable; and here I may conclude this division of my Essay with observing, in the plain but emphatical language of St. GERMAN, "that all the *former diversities* " be granted by secondary conclusions derived upon the " law of reason, without *any statute made in that behalf* ; " and, peradventure, laws and the conclusions therein be " the more plain and the more open ; for *if any statute were* " *made therein*, I think verily, more doubts and questions " would arise *upon the statute*, than doth now, when they " be only argued and judged after the *common law*."<sup>(s)</sup>

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(r) Epist. ad Fam. VII. 22.

(s) Doct. and Stud. dial. 2. chap. 38. last sentence.

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can be supported except in the circumstance of personal misconduct in any party employed in the post office. In the case of *Whitfield v. Lord Le Despencer*, which was an action brought against the Postmaster General, for a bank note stolen by one of the sorters out of a letter delivered into the Post Office, Lord Mansfield, relying upon the public nature of the post-master's employment—that the inferior officers, though appointed by him, gave security to the crown,—that they were subject to heavy penalties, and what in others would be a breach of trust, was in them declared to be a capital felony; decided, in concurrence with the other judges, that the action could not be maintained. See *Nicholson v. Mounsey*, 15 East, 384.

Laws of the  
Northern Na-  
tions.

[ 112 ]

Before I finish the *historical* part of my Essay, in which I undertook to demonstrate “that a perfect harmony subsisted on this interesting branch of jurisprudence in the codes of nations *most eminent for legal wisdom*,”(t) I cannot forbear adding a few remarks on the institutions of those nations who are generally called *barbarous*, and who seem in many instances to have deserved that epithet : although traces of sound reasoning and solid judgment appear in most of their ordinances.

By the ancient laws of the *WISIGOTHS*, which are indeed rather obscure, the “keeper of a horse or an ox for hire, as well as a *hirer for use*, was obliged, if the animal *perished*, to return another of equal worth :” the law of the *Baiuvarians* on this head is nearly in the same words ; and the rule is adopted with little alteration in the capitularies of *Charlemagne* and *Lewis the Pious*,(u) where the *Mosaic* law before cited concerning a borrower may also be found.(w) In all these codes a depositary of gold, silver, or valuable trinkets, is made chargeable, if they are destroyed by fire, and his own goods perish *not* with them ; a circumstance which some other legislators have considered as *conclusive* evidence of gross neglect or fraud : thus by the old *British* Tract, called the Book of *CYNAWG*, a person who had been robbed of a deposit, was allowed to clear himself by making oath, with compurgators, that he had no concern in the robbery, *unless he had saved his own goods* ; and it was the same, I believe, among the *Britons* in the case of a loss by fire, which happened without the fault of the bailee ; although *HOWEL the Good* seems to have been

Laws of the  
Britons.

(t) P. 11.

(u) Lindenbrog, LL. Wisigoth. lib. 5. tit. 5. s. 1, 2, 3. and LL. Baiuvar. tit. 14. s. 1, 2, 3, 4. Capitul. lib. 5 s. 204.

(w) Capitul. lib. 6. s. 22. Exod. xxii. 14, 15.

rigorous in this case for the sake of public security.(x) There was one regulation in the *Northern* code, which I have not seen in that of any other nation: if precious things were deposited and *stolen*, time was given to search for the thief, and if he could not be found within the time limited, a *moiety* of the value was to be paid by the depositary to the owner, “ut damnum ex medio uterque sustineret.”(y)

Now, I can scarce persuade myself, that the phrase used in these laws, *si id perierit*, extends to a perishing by *inevitable accident*; nor can I think that the old *Gothic* law, cited by *Stiernhook*, fully proves his assertion, that “a depositary was responsible for *irresistible force*;” but I observe, that the military lawgivers of the North, who entertained very high notions of good faith and honour, were more strict than the *Romans* in the duties by which depositaries and other trustees were bound: an exact conformity could hardly be expected between the ordinances of polished states, and those of a people who could suffer disputes concerning bailments to be decided by *combat*; for it was the Emperor *Frederick II.*, who [ 114 ] abolished the trial by battle in cases of contested deposits, and substituted a more rational mode of proof.(z)

I purposely reserved to the last the mention of the *HINDU*, or *Indian*, code, which the learning and industry of my much-esteemed friend, Mr. *Halhed*, has made accessible to *Europeans*,(4) and the *PERSIAN* translation of which I have had the pleasure of seeing; these laws, which must in *all times* be a singular object of curiosity,

Laws of the  
Indians.

(x) LL. Hywel Dda, lib. 3. cap. 4. s. 22. and lib. 3. cap. 3. s. 40. See also *Stiernh. De Jur. Sueon.* p. 256, 257.

(y) LL. Wisigoth. lib. 5. tit. 5. s. 3.

(z) LL. Longobard. lib. 2 tit. 55. s. 35. Constit. Neapol. lib. 2. tit. 34.

(4) By an English translation, published in 1781, the preface to the work contains many valuable remarks on the

are *now* of infinite importance ; since the happiness of millions, whom a series of amazing events has subjected to a *British* power, depends on a strict observance of them.

It is pleasing to remark the similarity, or rather identity, of those conclusions, which pure unbiassed reason in all ages and nations seldom fails to draw, in such juridical inquiries as are not fettered and manacled by *positive* institution ; and although the rules of the *Pundits* concerning *succession to property*, the *punishment of offences*, and the *ceremonies of religion*, are widely different from ours, yet in the great system of *contracts* and the common intercourse between man and man, the *POOTKE* of the *Indians*,<sup>(5)</sup> and the *DIGEST* of the *Romans*, are by no means dissimilar.<sup>(a)</sup>

Thus it is ordained by the sages of *Hindustan*, that  
 “ a depositor shall carefully inquire into the character  
 “ of his intended depositary ; who, if he undertake to  
 “ keep the goods, shall preserve them with *care* and *at-*

(a) “ Haec omnia,” says Grotius, “ Romanis quidem congruunt legibus, “ sed non ex illis primitus, sed ex aequitate naturali, veniunt : quare eadem “ apud alias quoque gentes reperire est.” De Jure Belli ac Pacis, lib. 2. cap. 12. s. 13.

history and antiquities of India : with respect to the code, Sir William Jones truly observes, that “ the rules of the *Pundits* concerning *succession to property*, the *punishment of offences*, “ and the *ceremonies of religion*, are widely different from ours ;” it may, however, be remarked, that the chapter “ of the division of inheritable property,” and that of justice,” are by no means unworthy the attention of the British lawyer, who is disposed to extend the researches connected with his professional science. Halhed’s Code of Gentoo Laws.

(5) Dr. Robertson (see his Disquisition on India, Appendix, p. 247—254.) bestows his approbation on the Indian Code, and compares it with that of Justinian.

“*tention*, but shall not be bound to restore the value of them, if they be *spoiled by unforeseen accident*, or *burned*, or *stolen*; UNLESS he *conceal* any part of them that has been saved, or unless *his own effects be secured*, or unless the accident happen after his *refusal* to redeliver the goods on a demand made by the depositor, or while the depositary, against the nature of the trust, presumes to *make use* of them;” in other words, “the bailee is made answerable for *fraud*, or for *such negligence*(6) as approaches to it.”(b)

So a *borrower* is declared to be chargeable even for *casualty or violence*, if he fail to return the thing after the completion of the business for which he borrowed it; but not, if it be *accidentally lost* or *forcibly seized*, before the expiration of the time, or the conclusion of the affair, for which it was lent :(c) in another place it is provided, that, if a *pledge* be damaged or lost by *unforeseen accident*, the creditor shall nevertheless recover his debt with interest, but the debtor shall not be entitled to the value of his pawn :(d) and that, if the pledgee use the thing

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(b) *Gentoo Laws*, chap. 4. See before, p. 47.

(c) Same chapter. See before, p. 68.

(d) Chap. 1. s. 1. Before, p. 84, 85.

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(6) The words of this part of the Braminical institutions are solemn and remarkable : they prove that the oriental notions on the subject of hospitality to *persons*, are extended with scrupulous consistency to the deposit of *goods* “If a person should make use of any property intrusted to him, or it be spoiled for want of his care and attention, then whatever crime it is for a woman to abuse her husband, or for a man to murder his friend, the same degree of guilt shall be imputed to him, and the value of the trust must be made good.” *Gentoo Laws*, c. 4. p. 120.

pledged, he shall pay the value of it to the pledgor in case of its loss or damage, whilst he uses it.(e)

In the same manner, if a person *hire* a thing *for use*, or if any *metal* be delivered to a *workman*, for the purpose of making vessels or ornaments, the bailees are holden to be discharged, if the thing bailed be destroyed or spoiled by *natural* misfortune or the injustice of the *ruling power*, UNLESS it be kept *after the time* limited for the return of the goods, or the performance of the work.(f)

All these provisions are consonant to the principles established in this Essay ; and I cannot help thinking, that a clear and concise treatise, written in the *Persian* or *Arabian* language, on the law of *Contracts*, and evincing the general conformity between the *Asiatic* and *European* systems, would contribute, as much as any regulation whatever, to bring our *English* law into good odour among those whose fate it is to be under our dominion, and whose happiness ought to be a serious and continual object of our care.

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Thus I have proved, agreeably to my undertaking, that *the plain elements of natural law*, on the subject of BAILMENTS, *which have been traced by a short analysis*, are recognised and confirmed by the wisdom of nations;(g) and I hasten to the third, or *synthetical*, part of my work, in which, from the nature of it, most of the *definitions* and *rules* already given must be repeated with little variation in *form*, and none in *substance* : it was at first my design to subjoin, with a few alterations, the *Synopsis* of DELRIO ; but finding that, as *Bynkershoek* expresses himself, with an honest pride, *I had leisure sometimes to write, but never to copy*, and thinking it unjust to embellish any production of mine with the inventions of ano-

(e) Chap. 1. s. 2. Before, p. 81.

(f) Chap. 4. and chap. 10. Before, p. 88. 91

(g) Before, p. 4. and 11.



ther, I changed my plan; and shall barely recapitulate the doctrine expounded in the preceding pages, observing<sup>1</sup> the method which logicians call *Synthesis*, and in which all sciences ought to be explained. III. The Synthesis.

1. To begin then with definitions: 1. *Bailment is a delivery of goods in trust, on a contract expressed or implied, that the trust shall be duly executed, and the goods re-delivered, as soon as the time or use for which they were bailed shall have elapsed or be performed.* Definitions.

2. *Deposit is a bailment of goods to be kept for the bailor without a recompense.*

3. *Mandate is a bailment of goods, without reward, to be carried from place to place, or to have some act performed about them.*

4. *Lending for use is a bailment of a thing for a certain time, to be used by the borrower without paying for it.*

5. *Pledging is a bailment of goods by a debtor to his creditor to be kept till the debt be discharged.*

6. *Letting to hire is, 1. a bailment of a thing to be used by the hirer for a compensation in money; or, 2. a letting out of work and labour to be done, or care and attention to be bestowed, by the bailee on the goods bailed, and that for a pecuniary recompense: or, 3. of care and pains in carrying the things delivered from one place to another for a stipulated or implied reward.*

7. *Innominate bailments are those where the compensation for the use of a thing, or for labour and attention is not pecuniary; but either, 1. the reciprocal use, or the gift of some other thing; or, 2. work and pains, reciprocally undertaken; or, 3. the use or gift of another thing in consideration of care and labour, and conversely.*

8. *Ordinary neglect is the omission of that care which every man of common prudence, and capable of governing a family, takes of his own concerns.*

9. *Gross neglect* is the want of that care which every man of common sense, how inattentive soever, takes of his own property.

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10. *Slight neglect* is the omission of that diligence which very circumspect and thoughtful persons use in securing their own goods and chattels.

11. A *naked contract* is a contract made without consideration or recompence.

II. The rules, which may be considered as axioms, flowing from natural reason, good morals, and sound policy, are these:

1. A bailee, who derives *no benefit* from his undertaking, is responsible only for *gross neglect*.

2. A bailee, who *alone* receives *benefit* from the bailment, is responsible for *slight neglect*.

3. When the bailment is *beneficial* to both parties, the bailee must answer for *ordinary neglect*.

4. A *special agreement* of any bailee to answer for more or less, is in general valid.

5. *All* bailees are answerable for actual *fraud*, even though the contrary be stipulated.

6. No bailee shall be charged for a loss by *inevitable accident* or *irresistible force*, except by *special agreement*.

7. *Robbery by force* is considered as *irresistible*; but a loss by *private stealth* is *presumptive* evidence of *ordinary neglect*.

8. *Gross neglect* is a violation of *good faith*.

9. No *action* lies to compel performance of a *naked contract*.

10. A reparation may be obtained by suit for every damage occasioned by an *injury*.

11. The negligence of a *servant*, acting by his master's *express* or *implied order*, is the negligence of the master.

III. From these *rules* the following *propositions* are *Propositions*.  
evidently deducible.

1. A *Depositary* is responsible only for *gross neglect* ;  
or, in other words, for a *violation of good faith*.

2. A *Depositary*, whose character is known to his  
depositor, shall not answer for *mere neglect*, if he take  
*no better care of his own goods*, and they also be spoiled  
or destroyed.

3. A *Mandatarry to carry* is responsible only for *gross*  
*neglect*, or a *breach of good faith*.

4. A *Mandatarry to perform a work* is bound to use a  
*degree of diligence adequate to the performance of it*.

5. A man cannot be compelled by *action* to perform  
his promise of engaging in a *deposit* or a *mandate*.

6. A reparation may be obtained by suit for *damage*  
occasioned by the *non-performance* of a promise to be-  
come a *depositary* or a *mandatarry*.

7. A *borrower for use* is responsible for *slight negli-*  
*gence*.

8. A *pawnee* is answerable for *ordinary neglect*.

9. The *Hirer* of a thing is answerable for *ordinary*  
*neglect*.

10. A *workman for hire* must answer for *ordinary* [ 121 ]  
*neglect* of the goods bailed, and apply a *degree of skill*  
*equal to his undertaking*.

11. A *Letter to hire* of his *care and attention* is re-  
sponsible for *ordinary negligence*.

12. A *Carrier for hire*, by *land* or by *water*, is an-  
swerable for *ordinary neglect*.

IV. To these *rules* and *propositions* there are some  
*exceptions* :

1. A man who *spontaneously* and *officiously* engages to *Exceptions*.  
*keep*, or to *carry*, the goods of another, though *without*  
*reward*, must answer for *slight neglect*.

2. If a man, through *strong persuasion*, and with *reluctance*, undertake the execution of a *mandate*, no more can be required of him than a *fair exertion of his ability*.

3. *All* bailees become responsible for losses by *casualty or violence*, after their *refusal* to return the things bailed on a **LAWFUL DEMAND**.

4. A **BORROWER** and a **HIRER** are answerable in **ALL EVENTS**, if they *keep* the things borrowed or hired *after the stipulated time*, or *use* them *differently* from their agreement.

5. A **DEPOSITARY** and a **PAWNEE** are answerable in **ALL EVENTS**, if they *use* the things deposited or pawned.

6. An **INNKEEPER** is chargeable for the goods of his guest *within his inn*, if the guest be *robbed* by the *servants* or *inmates* of the keeper.

[ 122 ] 7 A **COMMON CARRIER**, by *land* or by *water*, must indemnify, the owner of the goods carried, if he be **ROBBED** of them.

General corollary and remark.

V. It is *no* exception, but a *corollary*, from the *rules*, that “ every bailee is responsible for a loss by **ACCIDENT** “ or **FORCE**, however *inevitable* or *irresistible*, if it be “ occasioned by that *degree of negligence*, for which the “ nature of his contract makes him generally answerable ; and I may here conclude my discussion of this important title in jurisprudence with a general and obvious *remark* ; that “ *all* the preceding rules and propositions may be diversified to *infinity* by the *circumstances* of every particular case ; ” on which circumstances it is on the *Continent* the province of a *judge* appointed by the sovereign, and in **ENGLAND**, to our constant honour and happiness, of a *jury* freely chosen by the parties, *finally* to decide : thus, when a painted *cartoon*, pasted on canvas, had been *deposited*, and the bailee kept it so near a damp wall, that it peeled, and was much injured,

the question, "whether the depositary had been guilty  
 "of gross neglect," was properly left to the jury, and, on  
 a verdict for the plaintiff with pretty large damages,  
 the court refused to grant a new trial ;(h) but it was the  
 judge who determined, that the defendant was by *law*  
 responsible for *gross negligence only* ; and if it had been  
 proved, that the bailee had kept *his own* pictures of the [ 123 ]  
*same sort* in the same place and manner, and that *they*  
*too* had been spoiled, a new trial would, I conceive, have  
 been granted ; and so, if no more than slight neglect  
 had been committed, and the jury had, nevertheless,  
 taken upon themselves to decide against law, that a  
 bailee *without reward* was responsible for it.

Should the *method* used in this little tract be approved, Conclusion.  
 I may possibly not want inclination, if I do not want  
 leisure, to discuss in the same form *every* branch of *En-*  
*glish law, civil and criminal, private and public* ; after  
 which it will be easy to separate and mould into distinct  
 works the three principal divisions ; or the *analytical*,  
 the *historical*, and the *synthetical*, parts.

The great system of jurisprudence, like that of the  
 universe, consists of many subordinate systems, all of  
 which are connected by nice links and beautiful depen-  
 dencies ; and each of them, as I have fully persuaded  
 myself, is reducible to a few plain *elements*, either the  
 wise *maxims* of national policy and general convenience,  
 or the *positive* rules of our forefathers, which are seldom  
 deficient in wisdom or utility : if law *be a science*, and  
 really deserve so sublime a name, it must be founded on  
 principle, and claims an exalted rank in the empire of  
*reason* ; but if it be *merely* an unconnected series of de-  
 crees and ordinances, its use may remain, though its

(h) 2 Stra. 1099. Mytton and Cook.

dignity be lessened, and he will become the greatest lawyer who has the strongest habitual or artificial *memory*. In practice, law certainly employs *two* of the mental faculties; *reason*, in the primary investigation and decision of points *entirely new*; and *memory*, in transmitting to us the reason of *sage* and learned men, to which our own ought invariably to yield, if not from a becoming modesty, at least from a just attention to that object, for which all laws are framed, and all societies instituted—  
THE GOOD OF MANKIND.

## APPENDIX.

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*Trinity Term, 2 Anna Regina*

COGGS v. BERNARD.

2 Ld. Ray. 909

S. C. Com. 133. Salk. 26. 3. Salk. 11. Holt. 13. Entry. Salk 735.  
3 Ld. Raym. 163.

IN an action upon the case the plaintiff declared, *quod* If a man undertakes to carry goods (a) safely and securely, he is responsible for any damage they may sustain in the carriage thro' his neglect, tho' he was not a common carrier, and was to have nothing for the carriage. Vide 1 H. Bl. 158. ante p. 52. n 2.  
*cum Bernard* the defendant, the tenth of November, 13 Will, 3. at, &c. *assumpsisset, salvo et secure elevare, (Anglice, to take up)* several hogsheads of brandy then in a certain cellar in *D. et salvo et secure deponere (Anglice, to lay them down again)* in a certain other cellar in *Waterlane*, the said defendant and his servants and agents, *tam negligenter et improvere* put them down again into the said other cellar, *quod per defectum curæ ipsius* the defendant, his servants and agents, one of the casks was staved, and a great quantity of brandy, viz. so many gallons of brandy, was spilt. After not guilty pleaded, and a verdict for the plaintiff, there was a motion in arrest of judgment, for that it was not alleged in the declaration that the defendant was a common porter, nor averred that he had any thing for his pains. And the case being

(a) Vide ante, 53.

thought to be a case of great consequence, it was this day argued *seriatim* by the whole court.

*Gould, Justice.*—I think this is a good declaration. The objection that has been made is, because there is not any consideration laid. But I think it is good either way, and that any man, that undertakes to carry goods, is liable to an action, be he a common carrier or whatever he is, if through his neglect they are lost, or come to any damage: and if a *premium* be laid to be given, then it is without question so. The reason of the action is, the particular trust reposed in the defendant, to which he has concurred by his assumption, and in the executing which he has miscarried by his neglect. But if a man undertakes to build a house, without any thing to be had

(a) Vide 2 Ld.  
Raym. 919. 5.  
T. R. 149.  
ante 54. n. 4.

for his pains, an (*a*) action will not lie for non-performance, because it is *nudum pactum*. So is the 3 H. 6. 36. So, if goods are deposited with a friend, and are stolen from him, no action will lie. 29 Ass. 28. But there will be a difference in that case upon the evidence, how the matter appears; if they were stolen by reason of a gross neglect in the bailee, the trust will not save him from an action; otherwise, if there be no gross neglect. So is *Doct. and Stud.* 129. upon that difference. The same difference is where he comes to goods by finding. *Doct. and Stud. ubi supra. Ow.* 141. But if a man takes upon him expressly to do such a fact safely and securely, if the thing comes to any damage by his miscarriage, an action will lie against him. If it be only a general bailment, the bailee will not be chargeable, without a gross neglect. So is *Keilw.* 160. 2 H. 7. 11. 22 Ass. 41. 1 R. 10. *Bro. action sur le case.* 78. *Southcote's case* is a hard case indeed, to oblige all men, that take goods to keep, to a special acceptance, that they will keep them as safe as they would do their own, which is a thing no man living that is not a lawyer could think of:



and indeed it appears by the report of that case in *Cro. 2Ld. Ray. 310. EL. 815.* that it was adjudged by two judges only, viz. *Gawdy* and *Clench*. But in 1 *Ventr. 121.* there is a breach assigned upon a bond conditioned to give a true account, that the defendant had not accounted for 30*l.* the defendant showed that he locked the money up in his master's warehouse, and it was stole from thence; and that was held to be a good account. But when a man undertakes specially to do such a thing, it is not hard to charge him for his neglect, because he had the goods committed to his custody upon those terms.

*Powys* agreed upon the neglect.

*Powell.* The doubt is, because it is not mentioned in the declaration, that the defendant had any thing for his pains, nor that he was a common porter, which of itself imports a hire, and that he is to be paid for his pains. So that the question is, whether an action will lie against a man for doing the office of a friend; when there is not any particular neglect shown? And I hold, an action will lie, as this case is. And in order to make it out I shall first show, that there are great authorities for me, and none against me; and then secondly, I shall show the reason and *gist* of this action: and then thirdly, I shall consider *Southcote's* case.

1. Those authorities in the *Register 110. a. b.* of the pipe of wine, and the cure of the horse, are in point, and there can be no answer given them, but that they are writs, which are framed short. But a writ upon the case must mention every thing that is material in the case, and nothing is to be added to it in the count, but the time, and such other circumstances. But even that objection is answered by *Rast. Entr. 13. c.* where there is a decla-

ration so general. The year books are full in this point. 43 *Ed.* 3. 33. *a.* there is no particular act showed. There indeed the weight is laid more upon the neglect than the contract. But in 48 *Ed.* 3. 6. and 19 *H.* 6. 49. there the action is held to lie upon the undertaking, and that without that it would not lie; and therefore the undertaking is held to be the matter traversable, and a writ is quashed for want of laying a place of the undertaking. 2 *H.* 7. 11. 7 *H.* 4. 14. these cases are all in point, and the action adjudged to lie upon the undertaking.

2. Now, to give the reason of these cases, the *gist* of these actions is the undertaking. The party's special *assumpsit* and undertaking obliges him so to do the thing, that the bailor come to no damage by his neglect. And the bailee in this case shall answer accidents, as if the goods are stolen; but not such accidents and casualties as happen by the act of God, as fire, tempest, &c. So it is 1 *Jones* 179. *Palm.* 548. For the bailee is not bound, upon any undertaking against the act of God. Justice *Jones* in that case puts the case of the 22 *Ass.* where the ferryman overladed the boat. That is no authority I confess in that case, for the action there is founded upon the ferryman's act, *viz.* the overlading the boat. But it would not have lain, says he, without that act; because the ferryman, notwithstanding his undertaking, was not bound to answer for storms. But that act would charge him without any undertaking, because it was his own wrong to overlade the boat. But bailees are chargeable in case of other accidents, because they have a remedy against the wrong-doers: as in case the goods are stolen from him, an appeal of robbery will lie, wherein he may recover the goods, which cannot be had against enemies, in case they are plundered by them; and therefore in that case he shall not be answerable.

# APPENDIX.

V

But it is objected, that here is no consideration to ground the action upon. But as to this, the difference is, between being obliged to do the thing, and answering for things which he has taken into his custody upon such an undertaking. An (a) action indeed will not lie for not

(a) Vide 2 Ld. Raym 919. & the. books there cited. ante 54. n. 4.

doing the thing, for want of a sufficient consideration; but yet if the bailee will take the goods into his custody, he shall be answerable for them; for the taking the goods into his custody is his own act. And this action is founded upon the warranty, upon which I have been contented to trust you with the goods, which without such a warranty I would not have done. And a man

Warranty without a consideration is good. But see 3 Bl. Com. 166.

may warrant a thing without any consideration. And therefore, when I have reposed a trust in you, upon your undertaking, if I suffer, when I have so relied upon you, I shall have my action. Like the case of the Countess of Salop. An action will not lie against a tenant at will generally, if the house be burnt down. But if the action had been founded upon a special undertaking, as that in consideration, the lessor would let him live in the house, he promised to deliver up the house to him again in as good repair as it was then, the (b) action would have lain upon that special undertaking. But there the action was laid generally.

(b) Vide Com. 627. Burr 1638. ante 45.

3. *Southcote's* (c) case is a strong authority, and the reason of it comes home to this, because the general bailment is there taken to be an undertaking to deliver the goods at all events, and so the judgment is founded upon the undertaking. But I cannot think, that a general bailment is an undertaking to keep the goods safely at all events. That is hard. *Coke* reports the case upon that reason, but makes a difference were a man under-

(c) The notion in *Southcote's* case, 4 Rep. 83. b. that a general bailment and a bailment to be safely kept is all one, was denied to be law by the whole court, ex relatione m<sup>ri</sup> Bunbury. Note to 3d Ed.

takes specially, to keep goods as he will keep his own. Let us consider the reason of the case. For nothing is law that is not reason. Upon consideration of the authorities there cited, I find no such difference. In 9 *Ed.* 4. 40. *b.* there is such an opinion by *Danby*. The case in 3 *H.* 7. 4. was of a special bailment, so that that case cannot go very far in the matter. 6 *H.* 7. 12. there is such an opinion by the bye. And this is all the foundation of *Southcote's* case. But there are cases there cited, which are stronger against it, as 10 *H.* 7. 26. 29. *Ass.* 28. the case of a pawn. My lord *Coke* would distinguish that case of a pawn from a bailment, because the pawnee has a special property in the pawn; but that will make no difference, because he has a special property in the thing bailed to him to keep. 8 *Ed.* 2. *Fitzh. Detinue*, 59. the case of goods bailed to a man, locked up in a chest, and stolen; and for the reason of that case, sure it would be hard, that a man that takes goods into his custody to keep for a friend, purely out of kindness to his friend, should be chargeable at all events. But then it is answered to that, that the bailee might take them specially. There are many lawyers don't know that difference, or however it may be with them, half mankind never heard of it. So, for these reasons I think a general bailment is not, nor cannot be taken to be, a special undertaking to keep the goods bailed safely against all events. But if

(a) *Vide ante* (a) a man does undertake specially to keep goods safely, that is a warranty, and will oblige the bailee to keep them safely against perils, where he has his remedy over, but not against such where he has no remedy over.

(a) *Vide ante*  
41, 42. n. 3.

*Holt*, Chief Justice.—The case is shortly this. This defendant undertakes to remove goods from one cellar to another, and there lay them down safely, and he managed them so negligently, that for want of care in him

some of the goods were spoiled. Upon not guilty pleaded, there has been a verdict for the plaintiff, and that upon full evidence, the cause being tried before me at *Guikdhall*. There has been a motion in arrest of judgment, that the declaration is insufficient, because the defendant is neither laid to be a common porter, nor that he is to have any reward for his labour. So that the defendant is not chargeable by his trade, and a private person cannot be charged in an action without a reward.

I have had a great consideration of this case, and because some of the books make the action lie upon the reward, and some upon the promise, at first I made a great question, whether this declaration was good. But upon consideration, as this declaration is, I think the action will well lie. In order to show the grounds, upon which a man shall be charged with goods put into his custody, I must show the several sorts of bailments.

And (a) there are six sorts of bailments. The first sort (a) *Vide ante* 35. of bailment is, a bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor; 2 *Ld. Raym.* 913. and this I call a *depositum*, and it is that sort of bailment which is mentioned in *Southcote's* case. The second sort is, when goods or chattels that are useful, are lent to a friend *gratis*, to be used by him; and this is called *commodatum*, because the thing is to be restored in *specie*. *Commodatum.* The third sort is, when goods are left by the bailee to be used by him for hire; that is called *locatio et conductio*, and the lender is called *locato*, and the borrower *conductor*. The fourth sort is, when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in *Latin*, *vadium*, and in *English*, a pawn or a pledge. The fifth sort is when goods or chattels are delivered to be carried, or something is to be done about *Things to be carried, &c. for a reward.* *Pawns.*

To be carried  
without re-  
ward.

them for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them. The sixth sort is when there is a delivery of goods or chattels to somebody, who is to carry them, or to do something about them *gratis*, without any reward for such his work or carriage, which is this present case. I mention these things, not so much that they are all of them so necessary in order to maintain the proposition which is to be proved, as to clear the reason of the obligation, which is upon persons in cases of trust.

A man who receives good to keep gratis for the use of the bailor is not answerable for their loss or for any damage they may sustain unless he was guilty of some gross neglect with respect to them.

Vide Str. 10<sup>th</sup> 9  
Nor even then if he was guilty of the same neglect with respect to his own.

D. acc. 2 Ld.  
Raym. 655.  
Semb acc.  
Burr. 2300.  
Vide ante 44.  
62,

As to the (a) first sort, where a man takes goods in his custody to keep for the use of the bailor, I shall consider, for what things such a bailee is answerable. He is not answerable, if they are stolen without any fault in him, neither will a common neglect make him chargeable, but he must be guilty of some gross neglect. There is I confess a great authority against me, where it is held, that a general delivery will charge the bailee to answer for the goods if they are stolen, unless the goods are specially accepted, to keep them only as you will keep your own. But (b) my lord Coke has improved the case in his report of it; for he will have it, that there is no difference between a special acceptance to keep safely, and an acceptance generally to keep. But there is no reason nor justice in such a case of a general bailment, and where the bailee is not to have any reward, but keeps the goods merely for the use of the bailor, to charge him without some default in him. For if he keeps the goods in such a case with an ordinary care, he has performed the trust reposed in him. But according to this doctrine the bailee must answer for the wrongs of other people, which he is not, nor cannot be, sufficiently armed against. If the law be so, there must be some

(a) Vide ante 36.

(b) Vide 2 Ld. Raym. 655. ante 41.

just and honest reason for it, or else some universal settled rule of law, upon which it is grounded ; and therefore it is incumbent upon them that advance this doctrine, to show an undisturbed rule and practice of the law according to this position. But to show that the tenor of the law was always otherwise, I shall give a history of the authorities in the books in this matter, and by them show, that there never was any such resolution <sup>2</sup> *Ld. Ray.* 914. given before *Southcote's* case. The 29 *Ass.* 28. is the first case in the books upon that learning, and there the opinion is, that the bailee is not chargeable, if the goods are stolen. As for 8 *Edw.* 2 *Fitz. Detinue*, 59. where goods were locked in a chest, and left with the bailee, and the owner took away the key, and the goods were stolen, and it was held that the bailee should not answer for the goods. That case they say differs, because the bailor did not trust the bailee with them. But I cannot see the reason of that difference, nor why the bailee should not be charged with goods in a chest, as well as with goods out of a chest. For the bailee has as little power over them, when they are out of a chest, as to any benefit he might have by them, as when they are in a chest ; and he has as great power to defend them in one case as in the other. The case of 9 *Edw.* 4. 40. *b.* was but a debate at bar. For *Danby* was but a counsel then, though he had been chief justice in the beginning of *Ed.* 4. yet he was removed, and restored again upon the restitution of *Hen.* 6. as appears by *Dugdale's Chronicle Series*. So that what he said cannot be taken to be any authority, for he spoke only for his client ; and *Genney* for his client said the contrary. The case in 3 *Hen.* 7. 4. is but a sudden opinion, and that but by half the court ; and yet that is the only ground for this opinion of my lord *Coke*, which besides he has improved. But the practice has been always at *Guildhall*, to dis-

allow that to be a sufficient evidence to charge the bailee. And it was practised so before my time, all Chief Justice *Pemberton's* time, and ever since, against the opinion of that case. When I read *Southcote's* case heretofore, I was not so discerning as my brother *Powys* tells us he was, to disallow that case at first, and came not to be of this opinion, till I had well considered and digested that matter. Though I must confess reason is strong against the case to charge a man for doing such a friendly act for his friend ; but so far is the law from being so unreasonable, that such a bailee is the least chargeable for neglect of any. For if he keeps the goods bailed to him but as he keeps his own, though he keeps his own but negligently, yet he is, not chargeable for them ; for the keeping them as he keeps his own, is an argument of his honesty. *A fortiori* he shall not be charged, where they are stolen without any neglect in him. Agreeable to this is *Bracton*, lib. 3. c. 2. 99. b. *J. S. apud quem res deponitur, re obligatur, et de ea re, quam accepit, restituenda tenetur, et etiam ad id, si quid in re deposita dolo commiserit ; culpæ autem nomine non tenetur, scilicet decidie vel negligentie, quia qui negligenti amico rem custodiendam tradit, sibi ipsi et propriæ fatuitati hoc debet imputare.* As, suppose the bailee is an idle, careless, drunken fellow, and comes home drunk, and leaves all his doors open, and by reason thereof the goods happen to be stolen with his own ; yet he shall not be charged, because it is the bailor's own folly to trust such an idle fellow. So that this sort of bailee is the least responsible for neglects, and under the least obligation of any one, being bound to no other care of the bailed goods, than he takes of his own. This *Bracton* I have cited is, I confess, an old author, but in this his doctrine is agreeable to reason, and to what the law is in other

2 Ld. Ray. 915.



countries. The civil law is so, as you have it in *Justinian's Inst. lib. 3. tit. 15.* There the law goes farther, for there it is said, *Ex eo solo tenetur, si quid dolo commiserit : culpæ autem nominie, id est, desidie et negligentia, non tenetur.* Itaque securus est qui parum diligenter custoditam rem furto amiserit, quia qui negligenti amico rem custodiendam tradit, non ei, sed suæ facilitati id imputare debet. So that a bailee is not chargeable without an apparent gross neglect. And if there is such a gross neglect, it is looked upon as an evidence of fraud. Nay, suppose the bailee undertakes safely and securely to keep the goods, in express words, yet even that won't charge him with all sorts of neglects. For if such a promise were put into writing, it would not charge so far, even then. *Hob. 34.* a covenant, that the covenantee shall have, occupy, and enjoy certain lands, does not bind against the acts of wrong-doers. *3 Cro. 214. acc. 2 Cro. 425. acc.* upon a promise for quiet enjoyment.

A gross neglect an evidence of fraud

And if a promise will not charge a man against wrong-doers when put in writing, it is hard it should do it more so when spoken. *Doct. and Stud. 130.* is in point, that though a bailee do promise to re-deliver goods safely, yet if he have nothing for the keeping of them, he will not be answerable for the acts of a wrong-doer. So that there is neither sufficient reason nor authority to support the opinion in *Southcote's case*; if the bailee be guilty of gross negligence, he will be chargeable, but not for any ordinary neglect. As to the second sort of bailment, viz. *commodatum* or lending gratis, the borrower is bound to the strictest care and diligence to keep the goods, so as to restore them back again to the lender, because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect, he will be answerable : as if a man should lend another a horse, to go westward, or for a month ; if the bailee go northward,

Though a man who takes goods to keep gratis for the use of the bailee, expressly undertakes to redeliver them safely, he is not responsible for any loss or damage occasioned by a wrong doer. *Sed vide ante 45.*

he borrower of goods is responsible for any damage or loss if it was occasioned by his neglect. *Vide ante 65. 71. 73.* or if he used the goods in a manner not warranted by

the terms of  
the loan, vide  
ante 68. 69.

or keep the horse above a month, if any accident happen to the horse in the northern journey, or after the expiration of the month, the bailee will be chargeable; because he has made use of the horse contrary to the trust he was lent to him under, and it may be if the horse had been used no otherwise than he was lent, that accident would not have befallen him. This is mentioned in Bracton, ubi supra: his words are, *Is autem cui res aliqua utenda datur, re obligatur, quæ commodata est, sed magna differentia est inter mutuum et commodatum; quia is qui rem mutuam accepit, ad ipsam restituendam*

2Ld.Ray.916.

*tenetur, vel ejus pretium, si forte incendio, ruina, naufragio, aut latronum vel hostium incursu, consumpta fuerit, vel deperdita, subtracta vel ablata. Et qui rem utendam accepit, non sufficit ad rei custodiam, quod talem diligentiam adhibeat, qualem suis rebus propriis adhibere solet, si alius eam diligentius potuit custodire; ad vim autem majorem, vel casus fortuitos non tenetur quis, nisi culpa sua intervenerit. Ut si rem sibi commodatam domi, secum detulerit cum peregre profectus fuerit, et illam incursu hostium vel prædonum, vel naufragio amiserit, non est dubium quin ad rei restitutionem teneatur. I cite this author, though I confess he is an old one, because his opinion is reasonable, and very much to my present purpose, and there is*

Note in the Bracton before me, it is commodatum. but that must be a mistake, as you will find by Justinian, ubi supra, from whence Bracton has taken all his distinctions, and that almost word for word.

The borrower of goods shall not be responsible for a loss by robbery, unless the robbery was occasioned or facilitated by some neglect on his part, Vide ante 66.

no authority in the law to the contrary. But if the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him.

But if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that, and steal the horse, he will be chargeable; because the neglect gave the thieves the occasion to steal the horse.

Bracton says, the bailee must use the utmost care, but yet he shall not be chargeable, where there is such a force as he cannot resist.

As to the third sort of bailment, scilicet locatio or lending for hire in this case the bailee is also bound to take the utmost care, and to return the goods, when the time of the hiring is expired. And here again I must recur to my old author, fol. 62. b. Qui pro usu vestimentorum, auri vel argenti, vel alterius ornamenti, vel iumenti, mercedem dederit vel promiserit, talis ab eo consideratur custodia, qualem<sup>(a)</sup> diligentissimus paterfamilias suis rebus ad hibet, quam si præstiterit, et rem aliquo casu amiserit, ad rem restituendam non tenebitur. Nec sufficit aliquem talem diligentiam adhibere, qualem suis rebus propriis adhiberet, nisi talem adhibuerit, de qua superius dictum est. From whence it appears, that if goods are let out for a reward, the hirer is bound to the utmost diligence, such as the most diligent father of a family uses; and if he uses that, he shall be discharged. But every man, how diligent soever he be, being liable to the accident of robbers, though a diligent man is not so liable as a careless man, the<sup>(b)</sup> bailée shall not be answerable in this case, if the goods are stolen.

The hirer of goods is responsible wherever the borrower would be, see vid. ante 86. and not elsewhere.

<sup>(a)</sup> Vide ante 86.

<sup>(b)</sup> D. acc. 2 Ld. Raym. 1087.

As to the fourth sort of bailment, viz. vadium or a pawn, in this I shall consider two things; first, what property the pawnee has in the pawn or pledge, and secondly, for what neglects he shall make satisfaction.

As to the first, he has a special property, for<sup>(a)</sup> the pawn is a securing to the pawnee, that he shall be repaid his debt, and to compel the pawnor to pay him. But if the pawn be such as it will be the worse for using, the<sup>(b)</sup> pawnee cannot use it, as clothes, &c. but if it be such as will be never the worse, as if jewels for the purpose were pawned to a lady, she<sup>(c)</sup> might use them. But then she must do it at her peril; for whereas, if she keeps them locked up in her cabinet, if her cabinet should be broke open, and the jewels taken from thence, she

<sup>(a)</sup> S. P. 3 Salk. 261. Holt. 523. Salk. 522. 2 Ld. Raym. 917.  
<sup>(b)</sup> S. P. 3 Salk. 268. Holt. 523. Salk. 522.  
<sup>(c)</sup> S. P. 3 Salk. 268. Holt. 523. Salk. 522. vide ante 80, 81. If a pawnee

use the pawn about the keeping of which he is at no charge, he is answerable at all events for any loss or damage which may happen with respect to it while he is using it. S. P. 3 Salk. 268. Holt 28. Salk. 522. vide ante 80, 81. (d) S. P. 3 Salk. 268. Holt 522. Salk. 522. vide ante 80, 81.

The pawnee of goods is responsible for any loss or damage with respect to the pawn while he is warranted in detaining it, if it was occasioned by his negligence. Vide ante 75. otherwise he is not. S. P. 3 Salk. 268. Salk. 512. vide ante 75.

But he is answerable at all events for any loss or damage which happens after he ought to have returned the pawn. S. P. 3 Salk.

would be excused; if she wears them abroad, and is there robbed of them, she will be answerable. And the reason is, because the pawn is in the nature of a deposit, and as such is not liable to be used. And to this effect is *Ow. 123*. But if the pawn be of such a nature, as the pawnee is at any charge about the thing pawned, to maintain it, as a horse, cow, &c. then (d) the pawnee may use the horse in a reasonable manner, or milk the cow, &c. in recompence for the meat. As to the second point, *Bracton 99. b.* gives you the answer. Creditor, qui pignus accepit, re obligatur; et ad illam restituendam tenetur; et cum hujusmodi res in pignus data sit utriusque gratia, scilicet debitoris, quo magis ei pecunia crederetur, et creditoris quo magis ei in tuto sit creditum, sufficit ad ejus rei custodiam diligentiam exactam adhibere, quam si præstiterit, et rem casu amiserit, securus esse possit, nec impediatur creditum petere. In effect, if a creditor takes a pawn, he is bound to restore it upon the payment of the debt; but yet it is sufficient, if the pawnee use true diligence, and he will be indemnified in so doing, and notwithstanding the loss, yet he shall resort to the pawnor for his debt. Agreeable to this is *29 Ass. 28.* and *Southcote's case* is. But indeed the reason give in *Southcote's case* is, because the pawnee has a special property in the pawn. But that is not the reason of the case; and there is another reason given for it in the book of *Assize*, which is indeed the true reason of all these cases, that the law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care for restoring the goods. But, indeed, if the money for which the goods were pawned, be tendered to the pawnee before they are lost, the pawnee shall be answerable for them; because the pawnee, by detaining them after the tender of the money, is a

wrong-doer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined. And a man that keeps goods by wrong, must be answerable for them at all events, for the detaining of them by him is the reason of the loss. Upon the same difference as the law is in relation to pawns, it will be found to stand in relation to goods found.

As to the fifth sort of bailments, viz. a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts; either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the case of the common carrier, common hoyman, master of a ship, &c. which case of a master of a ship was first adjudged 26 Car. 2. in the case of *Mors v. Slew*, Raym. 220. 1 Vent. 190. 238. The law charges this person thus intrusted to carry goods, against all events but acts of God and of the enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c. and yet doing it in such a clandestine manner, as would not be possible to be discovered. And this is the reason the law is founded upon in that point. The second sort are bailies, factors, and such like. And though a bailee is to have a reward for his management, yet he is only to do the best he can.

268. Holt  
528. Saik. 522  
vide 2 Ld.  
Raym. 735.  
Ante 79. A  
man that  
keeps goods  
by wrong is  
at all events  
answerable  
for their loss  
or damage,  
vide ante 70,  
71.

2 Ld. Raym.  
918.  
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public em-  
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Holt 131 R.  
acc. 1 Wils.  
281. Barclay  
v. Yann. B. R.  
E. T. 24 G. 3.  
Trent and  
Mersey Com-  
pany v. Wood.  
B. R. E. T. 25  
G. 3. 1 T. R.  
27. vide 2 Ld.  
Raym. 264.  
Str. 128. Burr.  
2 00. 2827.  
Ante 103. A  
bailliff or fac-  
tor, though he  
is to have a  
reward, is not  
answerable

for any loss or damage which was not occasioned or facilitated by his neglect. S. P. Holt 131. Vide Vent. 121. 2 Lev. 5. ante 97. a.

6 Ser. & Raw. 290. 386.

And if he be robbed, &c. it is a good account. And the reason of his being a servant is not the thing; for he is at a distance from his master, and acts at discretion, receiving rents and selling corn, &c. And yet if he receives his master's money, and keeps it locked up with a reasonable care, he shall not be answerable for it though it be stolen. But yet this servant is not a domestic servant, nor under his master's immediate care. But the true reason of the case is, it would be unreasonable to charge him with a trust, farther than the nature of the thing puts it in his power to perform it. But it is allowed in the other cases, by reason of the necessity of the thing. The same law of a factor.

As to the sixth sort of bailment, it is to be taken, that the bailee is to have no reward for his pains, but yet that by his ill management the goods are spoiled. Secondly, it is to be understood, that there was a neglect in the management. But thirdly, if it had appeared that the mischief happened by any person that met the cart in the way, the bailee had not been chargeable. As if a drunken man had come by in the streets, and had pierced the cask of brandy; in this case the defendant had not been answerable for it, because he was to have nothing for his pains. Then the bailee having undertaken to manage the goods, and having managed them ill, and so by his neglect a damage has happened to the bailor, which is the case in question, what will you call this? In *Bracton*, lib. 3. 100. it is called *mandatum*. It is an obligation which arises *ex mandato*. It is what we call in *English* an acting by commission. And if a man acts by commission for another *gratis*, and in the executing his commission behaves himself negligently, he is answerable. *Vinnius*, in his Commentaries upon *Justinian*, lib. 3. tit. 27. 684. defines *mandatum* to be *contractus quo*

A man to whom goods are delivered for a purpose in respect of which he is to have no reward, is not answerable for any loss or damage occasioned by a third person.

Case lies for negligently executing a *gratis* commission. Vide 1 H. Bl. 158. ante 52. n. 2. 2 *Ld. Raym.* 919.

aliquid gratuito gerendum committitur et accipitur. This undertaking obliges the undertaker to a diligent management. Bracton, ubi subra, says, contrahitur etiam obligatio non solum scripto et verbis, sed et consensu, sicut in contractibus bonæ fide; ut in emptionibus, venditionibus, locationibus, conductionibus, societatibus, et mandatis. I don't find this word in any other author of our law besides in this place in *Bracton*, which is a full authority, if it be not thought too old. But it is supported by good reason and authority.

The reasons are, first, because in such a case, a neglect is a deceit to the bailor. For when he intrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him. And a breach of a trust undertaken voluntarily will be a good ground for an action. 1 *Roll. Abr.* 10. 2 *Hen.* 7. 11. a strong case to this matter. There the case was an action against a man, who had undertaken to keep an hundred sheep, for letting them be drowned by his default. And there the reason of the judgment is given, because when the party has taken upon him to keep the sheep, and after suffers them to perish in his default; inasmuch as he has taken and executed his bargain, and has them in his custody; if after he does not look to them; an action lies. For here is his own act, viz. his agreement and promise, and that after broke of his side, that shall give a sufficient cause of action.

A breach of a trust undertaken voluntarily is a good ground for an action. Vide ante 54, 55.

But, secondly, it is objected, that there is no consideration to ground this promise upon, and therefore the undertaking is but *nudum pactum*. But to this I answer, that the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management. Indeed, if the agreement had been executory,

(a) Vide ante,  
56, 57. 61.

Vide ante 54.  
n. (4)

2 *Ld. Raym.*  
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to carry these branches from one place to the other such a day, the(a) defendant had not been bound to carry them. But this is a different case, for *assumpsit* does not only signify a future agreement, but in such a case as this, it signifies an actual entrance upon the thing, and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing. The 19 *Hen.* 6. 49. and the other cases cited by my brothers, shew that this is the difference. But in the 11 *Hen.* 4. 33. this difference is clearly put, and that is the only case concerning this matter, which has not been cited by my brothers. There the action was brought against a carpenter, for that he had undertaken to build the plaintiff a house within such a time, and had not done it, and it was adjudged the action would not lie. But there the question was put to the court, what if he had built the house unskilfully, and it is agreed in that case an action would have lain. There has been a question made, if I deliver goods to *A.* and in consideration thereof he promise to re-deliver them, if an action will lie for not re-delivering them; and in *Yelv.* 4. judgment was given that the action would lie. But that judgment was afterwards reversed, and according to that reversal, there was judgment afterwards entered for the defendant in the like case. *Yelv.* 128. But those cases were grumbled at, and the reversal of that judgment in *Yelv.* 4. was said by the judges to be a bad resolution, and the contrary to that reversal was afterwards most solemnly adjudged in 2 *Cro.* 667. *Tr.* 21 *Jac.* 1. in the King's Bench, and that judgment affirmed upon a writ of error. And yet there is no benefit to the defendant, nor no consideration in that case, but the having the money in his possession, and being trusted with it, and yet that was held to be a



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THE END.

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920.

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THE END.

(a) Vide ante, 66, 67, 61. to carry these branches from one place to the other such

a day, the(a) defendant had not been bound to carry them. But this is a different case, for *assumpsit* does not only signify a future agreement, but in such a case as this, it signifies an actual entrance upon the thing, and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing. The 19 Hen. 6. 49. and the other cases cited by my brothers, shew that this is the difference. But in the 11 Hen. 4. 33. this difference is clearly put, and that is the only case concerning this matter, which has not been cited by my brothers. There the action was brought against a carpenter, for that he had undertaken to build the plaintiff a house within such a time, and had not done it, and it was adjudged the action would not lie. But there the

Vide ante 54.  
n. (4)

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920.

If a man promises to redeliver goods in consideration of having them delivered to him, an action will lie against him for not redelivering them. Vide ante, 60, 62.

question was put to the court, what if he had built the house unskilfully, and it is agreed in that case an action would have lain. There has been a question made, if I deliver goods to A. and in consideration thereof he promise to re-deliver them, if an action will lie for not redelivering them; and in *Yelv. 4.* judgment was given that the action would lie. But that judgment was afterwards reversed, and according to that reversal, there was judgment afterwards entered for the defendant in the like case. *Yelv. 128.* But those cases were grumbled at, and the reversal of that judgment in *Yelv. 4.* was said by the judges to be a bad resolution, and the contrary to that reversal was afterwards most solemnly adjudged in 2 Cro. 667. Tr. 21 Jac. 1. in the King's Bench, and that judgment affirmed upon a writ of error. And yet there is no benefit to the defendant, nor no consideration in that case, but the having the money in his possession, and being trusted with it, and yet that was held to be a

good consideration. And so a bare being trusted with another man's goods must be taken to be a sufficient consideration, if the bailee once enter upon the trust, and take the goods into his possession. The declaration in the case of *Mors v. Slew* was drawn by the greatest drawer in *England* at that time, and in that declaration, as it was always in all such cases, it was thought most prudent to put in, that a reward was to be paid for the carriage. And so it has been usual to put it in the writ, where the suit is by original. I have said thus much in this case, because it is of great consequence that the law should be settled in this point ; but I don't know whether I may have settled it, or may not rather have unsettled it. But however that happen, I have stirred these points, which wiser heads in time may settle. And judgment was given for the plaintiff.

THE END.



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